Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

PAUL WIMMER,

Petitioner,

v.

SUFFOLK COUNTY POLICE DEPARTMENT, AND JOHN GALLAGHER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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62pp

QUESTIONS PRESENTED

1. Section 704(a) of Title VII of the 1964 Civil Rights Act forbids an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this title." Under what circumstances is it nonetheless lawful for an employer to dismiss an employee because he or she expressed opposition to intentional racial discrimination?

2. Should the "policy or custom" requirement of *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), and its progeny be overturned or clarified?

PARTIES

The parties to this action are set forth in the caption.

The original complaint in this proceeding named as a defendant "Peter F. Cosgrove, Commissioner, Suffolk County Police Department." The complaint did not state more specifically whether Commissioner Cosgrove was sued in his official capacity or in his individual capacity. In the courts below this matter was litigated as a claim against Commissioner Cosgrove only in his official capacity; no monetary relief was sought from him personally. Accordingly, pursuant to Rule 25(d), Federal Rules of Civil Procedure, we have substituted the current Commissioner.

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Petitioner Paul Wimmer respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 5, 1999.

OPINIONS BELOW

The May 5, 1999, opinion of the court of appeals, which is reported at 176 F. 3d 125 (2d Cir. 1999), is set out at pp. 1a-21a of the Appendix. The February 10, 1997, oral opinion of the district judge dismissing petitioner's Title VII claim, which is not reported, is set out at pp. 22a-23a of the Appendix. The February 11, 1997, oral opinion of the district judge dismissing petitioner's section 1983 claim, which is not reported, is set out at pp. 24a-25a of the appendix.

JURISDICTION

The decision of the court of appeals was entered on May 5, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . . became he has opposed any practice made an unlawful employment practice by this title." Section 1983 of 42 U.S.C. provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Proceedings Below

Petitioner commenced this action in 1994 in the District Court for the Eastern District of New York, alleging that he had been dismissed from his position as a Suffolk County police officer because of his outspoken opposition to racial discrimination by the respondent police department. Petitioner asserted that his dismissal violated both the anti-retaliation provision of Title VII of the 1964 Civil Rights Act, section 704(a), and the First Amendment; petitioner brought his constitutional claim against the police department pursuant to 42 U.S.C. § 1983. Federal jurisdiction existed under 28 U.S.C. § 1343(3).

After extensive discovery the case was set for trial before a jury. At the close of the plaintiff's case, the district judge dismissed petitioner's Title VII claim; although the judge gave no reason for that action, it was taken in response to the respondents' argument that petitioner's opposition to racial discrimination fell outside the protection of section 704(a). (App. 22a-23a). After the completion of all testimony, the judge dismissed petitioner's remaining section 1983 claim. There was considerable evidence that a large number of officers had conspired to bring about petitioner's dismissal because they objected to his opposition to discrimination. The district judge held, however, that under *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), petitioner's section 1983 claim could not survive because the conspirators had hidden their motives from the Police Commissioner who made the final decision to dismiss petitioner. (App. 24a-25a).

The court of appeals affirmed dismissal of both the Title VII and section 1983 claims. The Second Circuit held that the

discrimination which petitioner had opposed did not violate Title VII itself, and that it was therefore permissible under section 704(a) for respondents to dismiss petitioner for having objected to those practices. (App. 14a-18a). The court of appeals ruled that under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the police department was not subject to suit, even if petitioner's dismissal was the result of hostility on the part of numerous high ranking officials to petitioner's opposition to racial discrimination; like the district court, the Second Circuit reasoned that the respondents were protected from legal action so long as the Police Commissioner lacked personal knowledge of the motives behind the retaliatory scheme that he consummated by dismissing petitioner. (App. 18a-21a).

Statement of the Facts

Because the courts below granted judgment as a matter of law dismissing petitioner's claims as legally insufficient, we set forth the evidence introduced in support of those claims.

Prior to the events giving rise to this litigation, petitioner had worked as a police officer for the New York City Police Department and the New York City Housing Authority Police Department. In 1993 he successfully applied to join the respondent Suffolk County Police Department, which has jurisdiction over the eastern portion of Long Island, a mixed rural and suburban area with relatively few racial minorities.

Petitioner's difficulties began shortly after he entered the Suffolk County Police Academy. As part of the Academy's intake process, petitioner was asked to fill out a "self introduction" form, setting out a brief biography and explaining why he wanted to join the Police Department. Petitioner's responses, which would haunt him throughout his all too brief career with the Suffolk County Police Department, included three statements to which his superiors took considerable offense. First, petitioner candidly articulated his general opposition to racial and other forms of discrimination. "I 'ALWAYS' treat 'all' persons with 'equal' concern and respect. . . . I am a white male who respects and admires all people."

(App. 3a). Second, petitioner stated that he regarded Justice Thurgood Marshall as his "mentor", and that his "local hero" was Judge Stuart Namm. Judge Namm was a crusading Suffolk County jurist who had worked with considerable success to oppose misconduct within the Suffolk County Police Department. Petitioner openly expressed his admiration for Judge Namm for his "courage to speak out on the injustices and collusion between the local police and prosecutors.". (App. 3a). Third, petitioner revealed that he was an active member of a police organization known as Humanity Against Hatred. Humanity Against Hatred, originally founded by a chaplin of the New York City Police Department, is an organization of federal, state, and local law enforcement officers who are opposed to discrimination and intolerance; its members include a number of other prominent officials, including a former mayor of New York City and a former governor of New York state.

The response of police officials to this biographical statement was swift and unequivocal. Petitioner testified that he was summoned to the Academy headquarters, "upbraided for the content of his self-introduction by several of his superiors . . . . [and] asked to resign." (App. 4a).

Petitioner successfully completed the Academy, and in September 1993 began his field training. What occurred thereafter was candidly summarized in a memorandum sent to the Police Commissioner five months later. "[O]nly good things were said about [petitioner] until Oct.24 . . . . After . . . he cannot ever do anything right." (App. 10a).

Racial issues arose throughout petitioner's training period. One of petitioner's field training officers's used a racial slur to refer to the African-American former mayor of New York City, David Dinkins. (App. 5a). Petitioner twice objected when his training officers without probable cause stopped vehicles because the occupants were Hispanic. Petitioner was dissuaded by his training officer from pursuing those objections, and was admonished by a training officer that his views had "alienate[d] cops" and "made [them] sick." (App. 5a). Petitioner testified that on one occasion he had heard on the police radio a reference to African-Americans as

"niggers," and that he had reported that misconduct to several of his superiors1[1]. Another officer in petitioner's presence referred to African-Americans as "spook[s]."[2] When petitioner provided assistance to an African-American family, one of his supervisors angrily demanded "whose side am I on anyway."[3]

Despite initially favorable evaluations, petitioner's situation deteriorated rapidly after October 24, 1993, when he was assigned to work under Officer Ferrante and later Officer Nolan, supervisors whom counsel for the respondent police department itself candidly characterized as the "bad F[ield] T[raining] O[fficer]s" (App. 12a). Petitioner made the mistake of discussing with Ferrante his membership in Humanity Against Hatred. Ferrante and another officer denounced petitioner as a "liberal" and a "fruitcake." According to petitioner, Officer Ferrante repeatedly used racial slurs when referring to civilians. (App. 6a).

Not surprisingly, Ferrante's written evaluation of petitioner's training was negative. Surprisingly, however, that report began with the following disclaimer by Officer Ferrante: "I am making this report for administrative purposes only and am not waiving my right to remain silent for any criminal investigation." (App. 10a n. 3). This document was among the reports ultimately reviewed by the Police Commissioner and others. Inexplicably, police officials appear to have made no effort to ascertain why Officer Ferrante thought it necessary to invoke his Fifth Amendment privilege against self incrimination, or what sort of criminal investigation he feared might arise out of his negative evaluation of petitioner. In this same period a backdated report critical of petitioner was placed in his file by another supervisor; the circumstances of that action remain in dispute. (App. 6a-7a).

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[1]Transcript of February 5, 1997, pp. 276, 280-82.

[2]Transcript of February 4, 1997, p. 120.

[3]*Id.* at 50.

After six weeks of training, petitioner met with another Lieutenant, who according to petitioner admonished him that the "stop hatred thing didn't go over well with one of my FTOs in particular . . . . my liberal school teacher mentality, didn't go over well with people at headquarters." (App. 9a). This Lieutenant did not identify by name the individuals at headquarters who objected to petitioner's views.

These events came to a head at a meeting held in January, 1994, which the court of appeals described as follows:

> Among others present were Deputy Chief Brown, Captain Rhodes, Lieutenant Murphy, Lieutenant Williams, Sergeant Brady, FTO Hodge, FTO Gormley, and FTO Ferrante. At the meeting, Lieutenant Murphy commented that "the words Mr. Wimmer select[s] to express his thoughts tend[] to make others feel that he was liberal in his viewpoint." The portion of Wimmer's personal statement referring to Judge Namm was read aloud during the meeting.

(App. 9a). The portion of the personal statement, including the reference to Justice Marshall, was read aloud at the insistence of Deputy Chief Brown. Petitioner's membership in Humanity Against Hatred was also discussed.[4]

In the wake of that meeting, Captain Brown and Deputy Chief Rhodes prepared a written recommendation that petitioner be dismissed. That recommendation was submitted to the Police Commissioner by another Chief, who expressly warned the Commissioner, in the passage quoted above, that despite early favorable evaluations after October 24 petitioner "cannot ever do anything right." The clear implication of that warning was that the subordinate officials who had given the post-October 24 negative evaluations were acting in concert and for reasons other than those disclosed in the submitted recommendation of dismissal.

The Police Commissioner, however, made no effort to

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[4]Transcript of February 10, 1997, p. 582.

ascertain why that had occurred. Instead, the Commissioner asked his legal advisor whether there was a "problem with the pattern" of concerted, apparently pretextual negative evaluations, and whether as a result termination "would present any legal problems." (App. 10a-11a). The Commissioner was advised that there would be no problems, and he then directed that a termination letter be prepared reciting as the reasons for dismissal the same negative evaluations which the Commissioner had been warned were suspiciously inconsistent with petitioner's earlier favorable evaluations.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S NARROW INTERPRETATION OF SECTION 704(A) OF TITLE VII CONFLICTS WITH DECISIONS OF NUMEROUS COURTS OF APPEALS AND OF THIS COURT AND WILL INTERFERE WITH VOLUNTARY EFFORTS TO PREVENT AND CORRECT VIOLATIONS OF TITLE VII

This case concerns the viability of the informal compliance mechanisms that are the hallmark of Title VII of the 1964 Civil Rights Act. For a quarter century this Court has stressed that the preferred methods of implementing Title VII are voluntary action and pre-suit conciliation which prevent discrimination, rather than after-the-fact litigation which provides redress for violations of the law. *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 417 (1975); *Kolstad v. American Dental Association*, --- U.S. --- (June 22, 1999). Effective internal corrective measures within an employer's own workforce also play an important role in reducing the large volume of employment discrimination complaints filed with the EEOC and in federal court.

The possibility that Title VII violations can be prevented or corrected by an employer itself, without the need for government intervention, depends heavily on the willingness of employees to raise with their supervisors or colleagues objections to perceived acts of discrimination. *Burlington*

Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2270 (1998). Inducing employees to come forward with information about such problems can be difficult, because workers "may well be reluctant to accept the risks of blowing the whistle on a superior." *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2291 (1998). The statutory linchpin of this congressional plan for voluntary internal corrective mechanisms is section 704(a), which protects an employee from retaliation for opposing practices made illegal by Title VII's substantive provisions.

The lower courts are sharply divided about the scope of the protection afforded by section 704(a)[5]. In a growing number of circumstances, including the instant case, the courts of appeals have expressly held that the dismissal of an employee for opposing discrimination on the basis of race or sex is perfectly legal under section 704(a). In several circuits, including the Second, it is today foolhardy for an employee to object to perceived discrimination by his or her employer without first consulting an attorney with expertise in Title VII law. For the vast majority of employees in those circuits, who lack access to such legal advice, section 704(a) has been transformed from a salutary protection into a trap for the unwary. Increasingly employees who seek to oppose the practices forbidden by Title VII do so "at the accuser's peril." Cf. *Parker v. Baltimore & O.R.Co.*, 652 F. 2d 1012, 1019 (D.C.Cir. 1981).

The courts of appeals which have construed section 704(a) in this narrow, and ultimately counterproductive, manner have fashioned three related loopholes permitting the dismissal of an employee for objecting to intentional discrimination; each of these loopholes in section 704(a) was applied by the court of appeals below. Other circuits have properly rejected this interpretation of section 704(a).

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[5]Similar issues have arisen regarding the Age Discrimination in Employment Act. *Hedgepeth v. Kaiser Foundation Health Plan of the Northwest*, 76 F. 3d 386, 1996 WL 29252 (9th Cir. 1996).

(1) *Retaliation Against Employees Who Reasonably Misapprehend the Legal Principles Relevant to their Opposition to Discrimination*

Although Title VII contains a broad prohibition against intentional discrimination on the basis of race and gender, there are some textual and caselaw based limitations on that prohibition, limitations which would constitute a defense if the employer were sued for such intentional discrimination. Complaining employees, however, are rarely if ever aware of these technical limitations on the scope of Title VII.

The lower courts are sharply divided as to whether an employee who opposed intentional discrimination can lawfully be dismissed if the employer can later show that--unbeknownst to the employee--the discrimination in question was permissible under Title VII. The circuit courts apply three different rules to a section 704(a) retaliation claim posing this problem: (a) the limitation on Title VII is always a defense to the section 704(a) action, regardless of whether that limitation was not clearly established law at the time of the employee's complaint, (b) the limitation on Title VII is a defense only if it was clearly established law at the time of the employee's complaint, and (c) an employee's error of law regarding that scope of Title VII is not a defense to a section 704(a) retaliation claim.

(a) In the Second, Fourth and Sixth Circuits, an employer which has retaliated against an employee for complaining about intentional discrimination can defeat a section 704(a) claim if it can persuade a court, years after the complaint and retaliation, to adopt some interpretation of Title VII under which that earlier intentional discrimination would have been legal. In these circuits an employee who complains about intentional discrimination does so at his or her peril, running the risk that future developments in the law will be applied retroactively to legalize retaliation.

The instant case is a typical application of that interpretation of section 704(a). Petitioner was dismissed in January, 1994, in part because he had complained about the use of racial epithets and race-based traffic stops by his supervisors

or other Suffolk County police officers. Three years later, in the decision below, the Second Circuit held that these practices did not violate Title VII, and on that basis concluded that retaliation against petitioner was therefore permissible under section 704(a). The Second Circuit did not claim that its interpretation of Title VII was well established in 1994; to the contrary, it conceded the issue "is one of first impression in this circuit." (App. 15a).

The pivotal interpretation of Title VII in the decision below was that the discrimination about which petitioner complained could not as a matter of law create a hostile work environment for minority employees, because such abuses--even if known and offensive to minority officers--were "directed" only at civilians. For this interpretation of Title VII--on which petitioner's section 704(a) claim foundered--the court below cited only what it thought was "inherent in the definition of a racially hostile work environment." (App. 17a). The Second Circuit did not deny that that there was considerable caselaw to the contrary. In fact, decisions in the Fifth[6] and Ninth[7] circuits have held that a hostile environment claim can be based in whole or part on discrimination against or abuse directed at non-employees. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986), this Court expressly approved the Fifth Circuit decision on this issue in *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971)[8]. In *Burlington Industries, Inc., v. Ellerth*, 118 S.Ct. 2257 (1998), two members of this Court described *Rogers* as "the landmark case" in the area of Title VII harassment. 118

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[6]*Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971).

[7]*Moyo v. Gomez*, 40 F. 3d 982, 986 (9th Cir. 1994)

[8]This Court noted that the Fifth Circuit in *Rogers* had held that "a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment by giving discriminatory service to its Hispanic clientele." 477 U.S. at 66.

S.Ct. at 2271 (Thomas, J., dissenting).[9]

The Second Circuit has also applied new interpretations of Title VII retroactively to dismiss earlier-filed section 704(a) retaliation claims in *Lanaux v. Central New York Psychiatric Center*, 152 F. 3d 919, 1998 WL 385913 (2d Cir. 1998)[10], and *Manoharan v. Columbia U. Col. of Phys. & Surgeons*, 842 F. 2d 590, 594 (2d Cir. 1998)(employee may be dismissed for advocating affirmative action by employer)..

The Fourth Circuit utilized the same retrospective methodology in *Mayo v. Kiwest Corp.*, 94 F. 3d 641, 1996 WL 460769 (4th Cir. 1996). The plaintiff in that case had allegedly been fired in 1995 for complaining about same-sex sexual harassment; in 1996 the Fourth Circuit held in another case that such same-sex harassment did not violate Title VII.[11] Subsequently the Fourth Circuit dismissed Mayo's section 704(a) retaliation claim on the ground that the harassment about which he had complained simply was not illegal, insisting that interpreting Title VII to apply to same-sex harassment would be "irrational". 1996 WL 460769 at *5. The court of appeals did not suggest, however, that its interpretation of Title VII had been well established when Mayo complained in 1995; to the contrary, it frankly acknowledged that at that time there was no

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[9]Justice Thomas' opinion described *Rogers* as holding that "the practice of racially segregating patients in a doctor's office could amount to discrimination in '"the terms, conditions, or privileges"' of employment, thereby violating Title VII.") '

[10]The substantive interpretation of Title VII underlying *Lanaux* was that discrimination against minority patients could not as a matter of law created a hostile environment for the minority nurses involved. The Second Circuit cited no pre-existing authority for this rule. The Fifth Circuit decision to the contrary in *Rogers* involved virtually identical facts.

[11]*McWilliams v. Fairfax County Bd. of Supervisors*, 72 F. 3d 1191 (4th Cir.), *cert. denied*, 519 U.S. 819 (1996).

caselaw on the issue.[12] (Two years after *Mayo*, of course, this Court unanimously held that same sex harassment was indeed illegal under Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)[13].)

In *Holden v. Owens-Illinois, Inc.*, 793 F. 2d 745 (6th Cir. 1986), the district court found that the plaintiff had in fact been dismissed because of his efforts to implement a company affirmative action plan. The Sixth Circuit held that such a retaliatory dismissal was entirely lawful under section 704(a), because on its view an employer's failure to take affirmative action could never constitute a violation of Title VII, 793 F. 3d at 749, applying an interpretation of Title VII first announced only in *Holden* itself[14].

(b) The Third, Seventh, Eighth and Eleventh Circuits, on the other hand, hold that a section 704(a) claim can only be defeated by a showing that at the time the plaintiff opposed the alleged discrimination the practice in question was legal under

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[12]1996 WL 460769 at *4-*5. The district court had insisted that Mayo's complaint was groundless precisely because at the time it occurred there was no caselaw on the issue in the Fourth Circuit. *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 337 (E.D.Va. 1995).

[13]Consistent with its practice of applying retroactively to section 704(a) claims later developments in substantive Title VII law, the Fourth Circuit later reinstated a similar retaliation complaint that had been dismissed under *Mayo* in light of the decision in *Oncale*, which was handed down some three years after the retaliatory dismissal at issue. *Scott v. Norfolk Southern Corp.*, 153 F. 3d 722, 1998 WL 387192 at *2 (4th Cir. 1998)

[14]Fourteen days after the Sixth Circuit's June 18, 1986, decision in *Holden*, this Court in *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), concluded to the contrary that there are indeed circumstances in which a court enforcing Title VII could order affirmative action. The Sixth Circuit, however, continues to insist that section 704(a) permits the dismissal of employees who advocate affirmative action. *Phillips v. Pepsi-Cola General Bottlers, Inc.*, 927 F. 2d 605, 1991 WL 27425 (6th Cir. 1991).

then existing clearly established law.

In *Berg v. La Crosse Cooler Co.*, 612 F. 2d 1041 (7th Cir. 1980), the plaintiff had been dismissed for opposing her employer's refusal to provide disability benefits to employees disabled by pregnancy or maternity. Subsequent to Berg's March 1976 dismissal, this Court held that such discrimination did not violate Title VII. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Seventh Circuit nonetheless ruled that Berg's actions were protected by section 704(a). Permitting an employer to defend a retaliatory dismissal by reliance on such later legal developments, the court of appeals reasoned, would impose on employees "the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute", and would "destro[y] one of the chief means of achieving [the elimination of discrimination through informal means], the frank and nondisruptive exchange of ideas between employers and employees." 612 F. 2d at 1045.[15]

In *Sisco v. J.S. Alberici Const. Co., Inc.*, 655 F. 2d 146 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982), the white plaintiff alleged that he had been dismissed in 1974 for opposing certain layoffs taken under his employer's affirmative action plan. This Court's subsequent decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), established that the actions to which Sisco had objected were in fact legal under Title VII. The Eighth Circuit nonetheless held that section 704(a) protected Sisco from retaliation for having opposed affirmative action which he believed was illegal under Title VII.

> We cannot say that this belief was unreasonable or in bad faith, even though we today hold, based largely on case law developed long after the events in issue, that the company's reduction in force was not unlawful.

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[15]See *Holland v. Jefferson National Life Insurance Co.*, 883 F. 2d 1307,1316 n. 6 (7th Cir. 1989)("plaintiffs 'should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute'")(*quoting Berg*).

655 F. 2d at 150.

Similarly, in *Drinkwater v. Union Carbide Corp.*, 904 F. 2d 863 (3d Cir. 1990), the Third Circuit held that under Title VII principles a plaintiff dismissed in 1985 for opposing a particular form of gender-based favoritism could still prevail despite an intervening 1988 decision upholding the legality of the practice to which she had objected. The Third Circuit insisted that that objection was protected because at the time it had occurred there was a "dearth of case law in this area", explaining that it would be unfair to require plaintiffs to "guess the outcome" of future litigation. 904 F. 2d at 865-66.

On the other hand, the limitations of the protection afforded to complainants by this rule is illustrated by the Eleventh Circuit decision in *Harper v. Blockbuster Entertainment Corp.*, 139 F. 2d 1385 (11th Cir. 1998). The plaintiffs in that case had been fired because they objected to their employer's facially discriminatory policy of permitting only women, but not men, to wear long hair. In dismissing their section 704(a) claim, the Eleventh Circuit stressed that at the time of that objection several circuits had agreed that such grooming standards were legal under Title VII. The court of appeals did not dispute the plaintiffs' contention that they had no actual knowledge of the Title VII caselaw, but insisted that whether their objection was "objectively reasonable" turned solely on what the law was at the time, not on what the laymen working at a video store could reasonably be expected to know about the intricacies of Title VII caselaw. 139 F. 2d at 1388-89.

(c) The Ninth and District of Columbia Circuits construe section 704(a) even more broadly, holding that employees who protest discrimination are protected by section 704(a) even if their belief in the illegality of the practice rests on a misapprehension of the law.

In *Moyo v. Gomez*, 32 F. 3d 1382 (9th Cir. 1994), the plaintiff prison guard had allegedly been dismissed for protesting discrimination against black inmates working in prison jobs. The defendant sought to dismiss the section 704(a) claim on the ground that the inmates were not "employees"

within the meaning of Title VII. The Ninth Circuit held that Moyo's complaint was protected by section 704(a), even if the inmates were not covered by Title VII at all.

> The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an objective standard--one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a *reasonable* mistake may be one of fact or law.

32 F. 3d at 1386 (Emphasis in original).

Similarly, in *Parker v. Baltimore & O.R.Co.*, 652 F. 2d 1012 (D.C.Cir. 1981), the District of Columbia Circuit insisted that a complaining employee who misapprehended the legality of the practices which he opposed would nonetheless be protected by section 704(a). The plaintiff in *Parker* had allegedly been dismissed for opposing his firm's affirmative action plan, a position that had little foundation in light of *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The court of appeals rejected the company's argument that Parker's misapprehension of the scope of Title VII was fatal to his retaliation claim.

> B&O argues that most of the cases rejecting a narrow reading of the opposition clause are inapposite here, because they involve mistakes "of fact" rather than mistakes "of law." . . . [W]e find the suggested distinction irrelevant to the purposes of section 704(a). Characterization of the employee's mistake as one of fact or of law affects neither the employee's interest in action on his beliefs nor the employer's interest in asserting legitimate management prerogatives.

652 F. 2d at 1020. One ironic result of this division among the circuits is that employees who *oppose* affirmative action are

protected from retaliation in the District of Columbia and Ninth[16] circuits, while employees who *support* affirmative action are subject to dismissal in the Second and Sixth Circuits.

(d) In a long line of decisions from *Pierson v. Ray*, 386 U.S. 547 (1967) to *Wilson v. Layne*, 119 S. Ct. 1692 (1999) this Court has insisted that government officials can only be held liable in damages in actions under 42 U.S.C. § 1983 when they violated clearly established constitutional rights. These decisions stem from a consistent recognition that public officials will be deterred from the proper exercise of their duties if they are at risk of liability based on future developments in the law. State and local officials are not "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. at 557.

The interpretation of section 704(a) utilized in the Second, Fourth and Sixth Circuits is fundamentally at odds with this Court's qualified immunity decisions. As this Court noted in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), if government employees risked being mulct in damages if they failed to predict future legal developments, that risk would "dampen the ardor of all but the most resolute." 457 U.S. at 814. The construction of section 704(a) applied in these circuits will have on opponents of intentional discrimination precisely the chilling effect which this Court's qualified immunity decisions are framed to avoid.

In the context of this case the conflict between these two lines of decisions yields a perverse result. Where, as here, government officials set out to dismiss an employee because they object to his opposition to discrimination, in any section 1983 action the perpetrators will be protected by qualified immunity from future developments in or clarifications of First Amendment law, but the victim can be denied the protection of section 704(a) on the basis of later developments in Title VII

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[16]See *Nelson v. Pima Community College*, 83 F. 3d 1075, 1082 (9th Cir. 1996)(assuming without deciding that opposition to affirmative action is protected by section 704(a)).

law.

(2) *Retaliation Against Employees Who Reasonably Misapprehend Facts Relevant to Their Opposition to Discrimination*

Seven circuits--the First[17], Third[18], Fifth[19], Sixth[20], Eighth[21], Tenth[22] and District of Columbia[23] circuit courts of appeals--hold that a section 704(a) plaintiff is not required to establish by a preponderance of the evidence that his or her employer in fact violated Title VII; to obtain the protections of section 704(a), a plaintiff need only demonstrate that he or she reasonably believed that discrimination had occurred. On the other hand, four circuits--the Second, Seventh, Ninth and Eleventh--hold that a retaliation victim must establish certain factual elements of the asserted Title VII violation in order to be protected by section 704(a).

There appears to be little rhyme or reason to which

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[17]*Montiero v. Poole Silver Co.*, 615 F. 2d 4, 8 (1st Cir. 1980).

[18]*Drinkwater v. Union Carbide Corp.*, 904 F. 2d 853, 865 (3d Cir. 1990).

[19]*De Anda v. St. Joseph Hosp.*, 671 F. 3d 850, 853 n. 2 (5th Cir. 1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F. 2d 1130, 1140 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

[20]*Booker v. Brown & Williamson Tobacco Co.*, 879 F. 2d 1304, 1312-13 (6th Cir. 1989).

[21]*Wentz v. Maryland Casualty Co.*, 869 F. 2d 1153, 1155 (8th Cir. 1989); *Sisco v. J.S. Alberici Const. Co., Inc.*, 655 F. 2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

[22]*Love v. RE/MAX of Am., Inc.*, 738 F. 2d 383, 385 (10th Cir. 1984).

[23]*Parker v. Baltimore & O.R.Co.*, 652 F. 2d 1012, 1020 (D.C.Cir. 1981)

elements of the underlying Title VII objection these courts have chosen to require a section 704(a) plaintiff to establish. Perhaps coincidentally, most of these special proof requirements have been imposed on section 704(a) plaintiffs who opposed racial or sexual harassment. Proof of the merits of a Title VII hostile environment harassment claim is complex, requiring a demonstration of four distinct elements: (a) that the harassment was based on gender, race, or some other forbidden characteristic, (b) that the victim subjectively perceived the resulting environment as hostile, (c) that a reasonable person would have regarded that environment as hostile, and (d) that a factual basis exists for attributing that environment to the employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ---, 118 S.Ct. 998 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998).

In the instant case, the Second Circuit insisted that a section 704(a) plaintiff dismissed for opposing harassment must prove the existence of the second element: "because Wimmer did not *introduce evidence* that minority employees of the department felt that they worked in a racially hostile environment, Wimmer could not reasonably have believed that he was protesting an unlawful work environment." (17a)(Emphasis added). That is, unless petitioner could *prove* that minority workers perceived a hostile environment, petitioner's belief that he was objecting to illegal conduct would be unreasonable and thus unprotected. In the instant case, of course, one of the incidents about which petitioner had complained was a reference to African American civilians, broadcast on the police radio, as "niggers." Any person of ordinary sensibility would conclude that this would be offensive to African American officers, but for the Second Circuit that was insufficient. The court of appeals insisted on precisely the evidence required to establish a harassment claim on the merits--testimony by minority officers that they in fact regarded the resulting environment as hostile.

The Seventh Circuit requires a section 704(a) plaintiff to establish the existence of the first element of a harassment

claim--that the harassment was discriminatory. In *Erwin v. Jerome Foods, Inc.*, 51 F. 3d 275, 1995 WL 115870 (7th Cir. 1995), the male plaintiff had complained to high ranking company officials about what he believed was sexual harassment by his male supervisor. The court of appeals upheld dismissal of Erwin's section 704(a) retaliation complaint because he had not established the necessary discriminatory motive on the part of his supervisor.

> Assuming that Erwin held a sincere belief that he was complaining of unlawful conduct, this belief was unreasonable. . . . Although [the supervisor's] language was sexually explicit and vulgar, it was neither discriminatory not intended to harass Erwin because of his gender. . . . Because his supervisor's language was not discriminatory, Erwin's belief that he was challenging unlawful conduct was unreasonable.

1995 WL 115870 at *4.

The Second, Ninth and Eleventh Circuits require a section 704(a) plaintiff to establish the facts sufficient to hold the employer liable for the hostile work environment complained of. In *Little v. United Technologies*, 103 F. 3d 956 (11th Cir. 1997), the plaintiff had been disciplined after he objected that a white employee had remarked, "Nobody runs this team but a bunch of niggers . . . ." 103 F. 3d at 958. The Eleventh Circuit held that Little's objection was not protected activity under section 704(a), because Little had not demonstrated that the employer was legally accountable for the abuse.

> Little's opposition to the racial remark . . . is protected conduct within the parameters of the statute only if [that abusive] conduct can be attributed to [the employer]. Based on the facts of this case, we conclude that [the harasser's] racially offensive comment alone is not attributable to [the employer] and, accordingly, Little's opposition to the remark did not constitute opposition to an unlawful employment practice.

103 F. 3d at 959-60. In *Couture v. JMJ, Inc.*, 172 F. 2d 875, 1999 WL 140603 (9th Cir. 1999), the plaintiff had allegedly been retaliated against because she complained that one of her subordinates was being racially harassed by a co-worker. The Ninth Circuit upheld an award of summary judgement against the plaintiff.

> To be deemed "protected activity," opposition must be directed at "an unlawful employment practice of an employer" . . . . Couture has presented no *evidence* that the [employer] either ratified or acquiesced in the harassment at issue.

1999 WL at *1 (Emphasis added).[24] Similarly, in *Reed v. A.W. Lawrence & Co., Inc.*, 95 F. 3d 1170 (2d Cir. 1996), the Second Circuit held that a woman allegedly dismissed for complaining about sexual harassment could not prevail under section 704(a) unless she demonstrated at trial that her employer was legally responsible for that harassment, such as by adducing "*evidence* from which a jury could conclude that the defendant's procedures did not 'provide a reasonable avenue of complaint.'" 95 F. 3d at 1181 (Emphasis added).

The requirement imposed by the Second Circuit below, and by the Second, Seventh, Ninth and Eleventh Circuits in other cases, is manifestly inconsistent with the majority rule that a section 704(a) plaintiff need not establish the merits of his or her underlying complaint. No less importantly, requirements of this sort will ordinarily deter a prudent employee from making any effort to oppose ongoing acts of discrimination. For example, in the Second, Ninth and Eleventh Circuits a woman who complains about sexual harassment by a co-worker will not be protected by section 704(a) unless the employer has in fact

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[24]See *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F. 3d 754,756 (9th Cir. 1997)("to satisfy the first element in a prima facie case of retaliation, Folkerson must show sufficient *facts* to impute the actions of the [harasser] to her employer. We conclude that Folkerson failed to show any *facts* which would indicate that Circus Circus in any way ratified or acquiesced in the . . . alleged sexual harassment")(Emphasis added).

been negligent in dealing with that co-worker's conduct. But a sexual harassment victim often would not know if the employer had in the past been negligent in dealing with harassment by that co-worker, and any effort on the victim's part to inquire about past complaints might itself lead to legally permissible retaliation.

This second judicially created loophole in section 704(a) is necessarily related to the first. Courts could not fault retaliation victims for failing to prove some element of their underlying discrimination complaint unless the employees were held responsible for knowing--or perhaps anticipating--each of the elements needed to establish that the merits of that original complaint. In the instant case, for example, the Second Circuit's reasoning necessarily rests on the assumption that an employee who complains about racial or sexual harassment is charged with constructive knowledge that racial harassment is only illegal if the victims regard that abuse as creating a hostile environment.

(3) *Retaliation Against Employees Who Express Generalized Opposition to Discrimination*

These first two loopholes in section 704(a) might be less harmful if an employee could make to his or her employer a generalized complaint of discrimination. There would be relative safety in the vagueness of such an objection, because courts could not later hold that some specific action complained of was in fact legal, or lacked sufficient evidentiary support. The Ninth Circuit holds that complaints of this type are in fact protected by section 704(a). "A letter protesting unspecified 'racism' and 'discrimination' in employer practices is protected opposition activity." *Jok-Ef v. Columbia Basin CLG.*, 66 F. 3d 335, 1995 WL 527996 *6 (9th Cir. 1995).

Three other circuits, however, hold that complaints of this sort fall outside the protection of section 704(a). In *White v. Rice*, 46 F. 3d 1130, 1995 WL 20796 (4th Cir. 1995), the Fourth Circuit ruled that "generalized verbal complaints" are not protected activity, distinguishing such objections from those in

which an employee "detail[ed] hiring practices and job conditions" which he or she claimed were discriminatory. 1995 WL 20796 at *3. Similarly, the Sixth Circuit holds that "[a]n employee may not invoke the protections of the Act by making a *vague* charge of discrimination." *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1313 (6th Cir. 1989)(emphasis added). In the instant case the Second Circuit joined this narrow reading of section 704(a), insisting that an employee could lawfully be fired for "opposing racist practices [by his or her employer] *generally*." (17a)(Emphasis added).

The circumstances of the instant case provide a stark illustration of the importance and danger of the rule in the Second, Fourth and Sixth Circuits permitting dismissal of an employee for expressing general opposition to intentional discrimination. The respondent police department has a long, troubled history of litigation and disputes about employment discrimination. The supervisors and training officers angered by petitioner's praise for Justice Marshall and Judge Namm knew exactly what petitioner's attitude toward employment discrimination was, and that he would not hesitate to object to any specific abuses which he saw. The dismissal of petitioner was largely a preemptive strike aimed at removing him before he could make and act on more specific complaints; the decision of the Second Circuit legalizes just such a tactic for perpetuating violations of Title VII.

II. THE "POLICY OR CUSTOM" REQUIREMENT OF *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVS.*, 436 U.S. 658 (1978), AND ITS PROGENY SHOULD BE OVERTURNED OR CLARIFIED

Two decades ago, in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), this Court held that local government bodies, although "persons" within the meaning of section 1983, could only be sued for constitutional violations which stemmed from a "policy" or "custom." 436 U.S. at 690-95. In the years that have followed, a series of decisions by this Court, in tandem with innumerable lower court opinions,

have created an increasingly complex interpretation of these requirements. In *Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382 (1997), four members of this Court suggested that the holding of *Monell* and its progeny should be reconsidered. 117 S.Ct. at 1400 (Souter, J., dissenting), 1401-1404 (Breyer, J., dissenting). Subsequent developments have further eroded the rationale of *Monell*. This case provides a particularly appropriate occasion for reconsidering the policy or custom requirement.

Justice Breyer's opinion in *Bryan County* delineates a number of factors supporting reexamination of *Monell* and its progeny. We set forth below several additional considerations warranting such reexamination, as well as particularly relevant circumstances in the instant case.

The now complex *Monell* jurisprudence began with a considerably simpler premise, that Congress did not intend that a city or county could be held liable merely because it employed an individual who had committed a constitutional violation[25]. No opinion, however, has ever suggested that this caselaw, or *Monell's* original "policy or custom" formulation itself, were grounded directly in the text or legislative history of section 1983. Rather, each additional limitation has been justified as the sole practicable alternative to holding a city liable for having done no more than employ an individual who violated a plaintiff's constitutional rights. Only application of this ever more complicated and restrictive body of law, past opinions argued, could prevent the liability standard "from collapsing into *respondeat superior* liability." *Bryan County*, 117 S. Ct.

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[25]*Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382, 1388 (1997)(*quoting Monell*); *Pembaur v. Cincinnati*, 475 U.S. 469, 478 (1986)(*quoting Monell*); *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985)(jury charge improper because it permitted jury to impose liability on the city "based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution"); *Monell*, 436 U.S. at 692 (statutory language "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.")

at 1391; see *Canton v. Harris*, 489 U.S. 378, 392 (1989)(any "lesser standard of fault would result in *de facto respondeat superior* liability on municipalities.")

Since *Bryan County*, however, this Court has concluded to the contrary, holding instead that it is indeed possible to formulate a completely different and considerably less restrictive standard which also stops well short of *respondeat superior*. In *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), the Court fashioned a standard of employer liability for sexual harassment with the express purpose of establishing a rule that "requires the existence of something *more* than the employment relation itself." 118 S. Ct. at 2268 (Emphasis added). This is precisely the purpose underlying the policy or custom requirement of *Monell* and its progeny. But in *Burlington Industries* the Court concluded that a non-*respondeat superior* rule could be fashioned without any of the restrictions and intricacies of the *Monell* jurisprudence.

First, this Court held in *Burlington industries* that where an employee has been injured by a tangible employment action "beyond question, *more* than the mere existence of the employment relation aids in the commission of the [violation]". 118 S. Ct. at 2268 (Emphasis added). "A tangible employment decision requires an official act of the enterprise, a company act." 118 S.Ct. at 2268. These holdings are palpably inconsistent with the insistence in the *Monell* line of cases that the policy or custom requirement is the only practicable alternative to *respondeat superior*, and that only actions by policymakers can fairly be said to be acts of their municipal employers. It is difficult to see, for example, how the dismissal of a county employee can be an "official act" for purposes of Title VII, *Burlington Industries*, 118 S.Ct. at 2268, but not the "ac[t] of the *municipality*" for purposes of section 1983. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)(emphasis in original).

Second, in the absence of such an official act, *Burlington Industries* concluded--again to avoid holding a defendant liable based solely on the fact that the misconduct at

issue was engaged in by an employee--that an employer should be permitted to establish an affirmative defense by showing that it had exercised reasonable care to prevent the misconduct, and that the victim unreasonably failed to mitigate damages by utilizing some corrective mechanism. Recognition in section 1983 litigation of such an affirmative defense would manifestly result in a liability rule different than *respondeat superior*, without need for the elaborate *Monell* jurisprudence.

The circumstances of this case illustrate the perverse incentives that have been the cumulative effect of the *Monell* progeny. *Bryan County* held that even where a policymaker has reason to know that his action is likely to lead to some constitutional violation, he is under no obligation to ask questions or otherwise investigate the possible consequences. 117 S.Ct. at 1392-93. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), held that a city faces no liability under section 1983 if subordinate officials are careful not to tell a policy maker about the unconstitutional purposes behind some proposed action. In the wake of these decisions, "don't ask, don't tell" has become the ideal government policy for avoiding liability in a section 1983 action, just as it was under the Eleventh Circuit decision overturned in *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1996); see 111 F. 3d 1530, 1546-47 (11th Cir. 1997)(Tjoflat, J., dissenting).

In the instant case, exploiting these rules to the hilt, a veritable platoon of high ranking and other police officials allegedly concocted a pretext for dismissing petitioner, and the police chief--warned in writing that the proposed reasons for that dismissal were indeed pretextual--was assured that petitioner could nonetheless be dismissed with impunity. In the courts below, respondents argued with success that this very scheming and deliberate blindness precluded liability under *Monell*. In *Burlington Industries* the Court held, to the contrary, that such unthinking ratification of the proposals of improperly motivated subordinates would result in liability. 118 S.Ct. at 2269 (*citing Shager v. Upjohn Co.*, 913 F. 2d 398 (7th Cir. 1990)). But such a lack of reasonable care, the touchstone of lability under *Burlington Industries*, is often, as here, an affirmative defense

under *Monell*.

This case also illustrates that municipalities have not, in reliance on *Monell*, somehow adjusted their financial affairs on the assumption that they will only incur financial liability in those rare cases where a constitutional violation involves a policy or custom. New York law requires cities and counties to "indemnify and save harmless" any employee held liable for conduct that was "within the scope of his public employment or duties". Public Officers Law, § 18(4)(a). Many states impose similar indemnification obligations on their cities and counties. *Bryan County*, 117 S.Ct. at 1404 (Breyer, J., dissenting).

The opinion below also demonstrates the seemingly limitless confusion and complexity of *Monell* jurisprudence. The scheme to dismiss petitioner involved a Chief, a Deputy Chief, two Captains, two Lieutenants, one Sergeant, and numerous training officers, a far cry from the "one 'bad apple'" for which this Court in *Oklahoma City v. Tuttle*, 471 U.S. 808, 812 (1985), insisted that a city should not be responsible. The Second Circuit dismissed this widespread participation on the ground that there was no evidence that "the [Police] Commissioner had *established* a . . . custom, in a broad sense, of terminating probationary officers for their political beliefs, or even of fostering an environment conducive to such actions." (19a)(Emphasis added). The court of appeals' insistence that a custom must be "established" by a policymaker is assuredly inconsistent with even *Monell*; the whole purpose of the "custom" element of the *Monell* line of cases is to impose liability where a policymaker had not acted. The specificity of the custom required by the court below poses yet another conundrum under *Monell*. There was substantial evidence of widespread animus within the Suffolk County Police toward officers who opposed discrimination or reported possible misconduct, the all too common "blue wall of silence"; but the specific way in which that custom was enforced, in this case by procuring the dismissal of a non-conforming officer on pretextual charges, may not itself be a "custom" in the sense that it occurs regularly, or indeed has occurred before at all. In addition, the courts below applied *Monell* to bar petitioner's

claim for injunctive relief. Presumably yet additional elaborations of *Monell* could be framed to correct these errors, but it would be more appropriate instead to reassess the wisdom of the seemingly endless process to which *Monell* and its progeny have led of fashioning ever new legal doctrines about the policy or custom requirement.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Paul WIMMER, Plaintiff-Appellant,

v.

SUFFOLK COUNTY POLICE DEPARTMENT and Peter F. Cosgrove, Commissioner of Suffolk County Police Department, Defendants-Appellees, Suffolk County, Defendant.

Docket No. 97-7321.

United States Court of Appeals, Second Circuit.

Argued Nov. 5, 1997.

Decided May 5, 1999.

Traycee Ellen Klein, Dienst & Serrins, LLP, New York, NY, for Plaintiff-Appellant.

Christopher A. Nicolino, Assistant Suffolk County Attorney, Hauppauge, N.Y. (Robert J. Cimino, Suffolk County Attorney, Hauppauge, NY, of counsel, Theodore D. Sklar, James M. Catterson, on the brief), for Defendants-Appellees.

Before: MINER and PARKER, Circuit Judges, and DEARIE, District Judge.*

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* The Honorable Raymond J. Dearie, of the United States District Court for the Eastern District of New York, sitting by designation.

MINER, Circuit Judge:

Plaintiff-appellant Paul Wimmer appeals from a judgment entered in the United States District Court for the Eastern District of New York (Wexler, J.) dismissing his claims for money damages against defendants-appellees Suffolk County Police Department (the "Police Department" or "Department") and Peter F. Cosgrove, Commissioner of the Department. Wimmer, who was a probationary police officer in the Department, alleged that he was terminated at the end of his probationary period because of his stance against racism in the Department and his political beliefs. Wimmer brought a claim of retaliation under 42 U.S.C. § 2000e-3(a) (1994) ("Title VII") and N.Y. Executive Law § 296(1)(e) (McKinney 1993),[1] and a claim under 42 U.S.C. § 1983 (1994) for deprivation of his rights under the First and Fourteenth Amendments. At trial, the district court granted judgment as a matter of law on the former claim at the end of Wimmer's case, reasoning that Wimmer had not presented any evidence that he was engaged in a "protected activity" under Title VII. With respect to the § 1983 claim, the court granted judgment as a matter of law at the end of the defendants' case, determining that Wimmer had not presented evidence that the Commissioner had established an actionable "policy" or "custom" or that he had acted to deprive Wimmer of his constitutional rights under § 1983.

For the reasons that follow, we affirm.

BACKGROUND

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[1]Because New York courts follow federal law to adjudicate claims under the New York Human Rights Law, the state law claim and the Title VII claim are collectively discussed under the "Title VII" heading throughout the remainder of this opinion. See *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir.1992).

After passing a civil service exam, Wimmer was appointed to serve as a probationary member of the Department in late March of 1993. Department procedures required Wimmer to undergo six months of training at the Suffolk County Police Department Academy (the "Academy"), followed by twelve weeks of field training.

Within the first few days of his attendance at the Academy, Wimmer submitted a self-introduction statement in accordance with Academy policy. In this statement, Wimmer described his "career expectation" as becoming a "Detective Lietenant (sic), commanding officer of the Homicide Squad, perhaps making CAPTAIN." Wimmer expanded on his background and goals, writing,

> I am an ethicist, a lover of wisdom and justice.... I find myself respecting the rights of the accused whereas I "ALWAYS" treat "All" Persons with "equal" concern and respect.... I have recently been nominated Vice President of Humanity Against HATRED.... My legal mentor is Thurgood Marshall, and my Local hero is the Honorable Judge (retired) Stuart Namm for his courage to speak out on the injustices and collusion between the local police and prosecutors. I am a white male who respects and Admires All People.

Humanity against Hatred is an organization founded by New York City police officers and clergy to oppose bias and discrimination. Wimmer named Thurgood Marshall as a hero because, "up against insurmountable odds," Marshall "got a unanimous decision" to overturn "the most racist American legal doctrine, [separate] [b]ut [e]qual." Judge Namm, a retired Suffolk County judge, was named because "he spoke out against" the "many civil rights abuses by the Suffolk County Police Department [and] ... the District Attorney [and] ... unethical police conduct in general."

Wimmer alleges that, following submission of his statement, he was "singled out" as a person who did not belong at the Academy. He recounts an episode in which he was called down to Academy headquarters and upbraided for the content of his self-introduction statement by several of his superiors. At

this meeting, he was purportedly asked to resign.

Throughout his tenure at the Academy, Wimmer was required to write "internal correspondence" many times. The "Form 42" correspondence was required in response to various violations of the disciplinary code committed by Wimmer. Wimmer attributes the disciplinary citations to a pattern of harassment by Academy instructors designed to force his resignation. Ultimately, Wimmer did not resign but instead graduated from the Academy in September of 1993. He graduated near the bottom of his class, with a final grade of 77.34--2.34 points above the minimum passing grade of 75.

After graduating from the Academy, Wimmer began field training. Typically, field training involves four phases of training ("Phases I, II, III, and IV," respectively) of three weeks each. Wimmer's training took place at two police precincts, the Fifth Precinct and the Sixth Precinct. During field training, a Field Training Officer ("FTO") rides with a probationary police officer ("PPO"), observes and evaluates the PPO, and instructs the PPO in proper police procedures. FTOs fill out Field Training Daily Observation Reports ("DORs") on a daily basis to report their observations of the PPO, and a patrol supervisor fills out "End of Phase" reports to summarize the PPO's performance at the end of each phase.

Wimmer performed the first two phases of his field training at the Fifth Precinct. Generally, during Phase I, his FTOs reported on the DORs that he performed most tasks at a "minimum acceptable" level, earning a four out of a possible seven on the rating scale. Occasionally, the FTOs reported a "superior" five or six rating in various "appearance and attitude" and "officer safety" categories. Wimmer also received an "unacceptable" three rating in some of the "use of radio" categories and occasionally in other categories. The End of Phase report is generally positive in its assessment of Wimmer's performance: "[PPO] Wimmer makes a good appearance and has a good attitude toward police work. He has for the most part demonstrated acceptable performance standards for a first phase [PPO]. His use of the police radio is an area that he will need to improve as he progresses in field training."

Wimmer claims to have discussed his membership in Humanity Against Hatred with one of his FTOs, Officer Pitts, during Phase I. Apparently, Wimmer told Officer Pitts that the Mayor of New York City at the time, David Dinkins, was an honorary member of Humanity Against Hatred. In this conversation, Wimmer states that Pitts used a racial slur to refer to Dinkins, who is African- American.

During Phase II, Wimmer's ratings generally improved, although comments written by his FTOs noted several areas of deficiency. On the first day of Phase II, Wimmer's FTO, Officer Hodge, noted that "[PPO] should calm down somewhat in verbalizing what seems to be a paramount desire to achieve higher rank. While most cops would like to achieve rank we don't all speak of it as if nothing else existed on the job EXCEPT making rank." Wimmer's use of the radio had apparently improved only to a minimally acceptable level, and deficiencies were also noted in regard to report and memo book writing. Although Wimmer was criticized for his derogatory attitude toward the public and his unwillingness to accept criticism, several FTOs noted his positive attitude and enthusiasm for police work. In his End of Phase II report, the reviewing officer, Sergeant Brady, stated that "he will be an asset to the [Department]."

In the course of Phase II training, Wimmer claims to have been in a patrol car on two occasions when Officer Hodge, without probable cause, stopped a vehicle containing "minorities." Wimmer alleges he was dissuaded from asking questions about these and other incidents, and was told by Officer Hodge and another of his FTOs that he "alienate[d] cops" and "made [them] sick." He also claims to have heard racial slurs used on the police radio, which he reported to Lieutenant Williams at the Sixth Precinct.

Wimmer's field training moved to the Sixth Precinct for Phase III. On his first day of Phase III, Wimmer claims to have witnessed one of his FTOs from the Fifth Precinct speaking to Officer Ferrante, one of his FTOs at the Sixth Precinct. In Phase III, Wimmer's ratings on his DORs were generally lower than during Phases I or II. On his second day

of Phase III, Officer Ferrante observed that Wimmer "appear[ed] to be far behind in field training." Ferrante noted deficiencies in report writing and radio operation and stated that Wimmer sometimes made inappropriate comments. Ferrante also criticized Wimmer for his lack of professionalism and inability to take charge of a situation. Although Officer Ferrante reported at one point that he "does not believe [Wimmer] should be a police officer," the End of Phase report, completed by Lieutenant Williams, was somewhat less harsh in its assessment: "[PPO's] evaluations are nearly entirely in the 'minimum acceptable' category. [PPO] says inappropriate remarks at times and has been counseled [in] reference [to] his tendancy (sic) to 'overtalk.' A marginal improvement in some categories, but will require extension of [FTO] training."

During Phase III, Wimmer reports that he began to be called a "liberal" and a "fruitcake" by Officer Ferrante and another officer in the Sixth Precinct. He claims that Officer Ferrante repeatedly used racial slurs and also claims to have discussed his membership in Humanity against Hatred with Ferrante.

Wimmer's FTO in Phase IV was once again Officer Ferrante. Wimmer's ratings in Phase IV deteriorated somewhat from Phase III. He began to have a larger number of "unacceptable" ratings and fewer "superior" ratings. For the first time, the rating of "Not Responding To Training" appeared on Wimmer's DORs. Ferrante again noted that Wimmer was having trouble taking charge of situations. He also criticized Wimmer for making inappropriate comments and for paying more attention to his outside activities than to police work.

Sometime before the end of Phase IV, it came to Wimmer's attention that Sergeant Brady in the Fifth Precinct had submitted a changed End of Phase report evaluating Wimmer for Phase II. This revised report was dated October 24, 1993, the last day of Wimmer's Phase II training and the same date as the original End of Phase report, although it was prepared later. In contrast to the mostly positive comments on the original End of Phase report for Phase II, the new report included the following comment:

> While PPO Wimmer shows enthusiasm for his job, he has difficulty relating to his Field Training Officers. It was reported to the undersigned that PPO Wimmer expresses a cynical attitude toward civilians. This, however, is not done in the presence of the civilians. These types of shortcomings were reported to me by three of PPO Wimmer's FTOs.

Sergeant Brady later explained that he had created the original End of Phase report based solely on the FTOs' comments on the DORs. The day after submitting the original report, however, Sergeant Brady was approached by one of Wimmer's Phase II FTOs, Officer Gormley, who offered more severe criticism of Wimmer than had been included in his DORs. After speaking with Wimmer's other Phase II FTOs, Sergeant Brady drafted internal correspondence to his superior, Inspector Raber, reflecting the new information.

The correspondence from Sergeant Brady traveled through the chain of command to the office of the Chief of Patrol. Apparently, the new information was also disseminated to the Sixth Precinct, because Sergeant Brady soon thereafter received a telephone call from Lieutenant Williams of the Sixth Precinct directing him to file a revised End of Phase report for Phase II. Sometime after Sergeant Brady submitted the revised End of Phase report, Captain James Rhodes, who works in the Chief of Patrol's office, called Sergeant Brady to discuss the internal correspondence and the revised End of Phase report. After this conversation, Captain Rhodes discussed Wimmer's problems with Rhodes' superior, Deputy Chief of Patrol Russell Brown.

Deputy Chief Brown consulted with officers in the Sixth Precinct and resolved that Wimmer should undergo two additional cycles of field training and two additional days of instruction at the Academy. According to Deputy Chief Brown, the extension of training "was to give [Wimmer] the best opportunity to get the most out of our training to be a police officer. We were trying to salvage the officer, and it was my determination that we would do extra field training to that goal."

Thus, Wimmer began Phase V at the Sixth Precinct under the supervision of FTOs Frank Nolan and James Brierton. Wimmer claims that on the first day of Phase V, Officer Nolan told him that he could not give him good evaluations because FTO Ferrante had given him bad evaluations and Nolan would "be sued" if he gave Wimmer good ones. Wimmer's average numerical rating for most categories during Phase V was a "minimum acceptable" four, but he received "Not Responding to Training" ratings in report writing categories approximately one third of the time.[2] Some of the difficulties that Wimmer encountered during earlier phases of his training apparently continued. Officers Nolan and Brierton observed serious deficiencies in Wimmer's report writing skills and noted that Wimmer was overly talkative. The FTOs also observed that Wimmer sometimes made inappropriate remarks to the public and seemed occasionally to lose focus on his own police work, preferring to discuss other subjects such as his outside activities.

Wimmer's Phase VI FTO was once again Officer Nolan. His evaluations during Phase VI were generally worse than in Phase V, and Officer Nolan noted particular deficiencies in regard to Wimmer's knowledge of penal law and his report writing skills. Although Nolan noted some instances in which Wimmer performed exceptionally well, he once again criticized Wimmer for inappropriate comments and questioned Wimmer's ability to perform under pressure. These concerns, as well as Wimmer's inability to accept criticism and lack of improvement, led Officer Nolan to recommend that Wimmer's employment be terminated. In the End of Phase report, Lieutenant William Murphy summarized Wimmer's performance as follows:

> PPO Wimmer has an unacceptable number of low ratings and indications by his FTO that he

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[2]Wimmer underwent two apparently uneventful days of remedial training at the Academy during Phase V. He claims that his training consisted solely of firearms safety and exercises in paragraph rearrangement.

> has not been responding to training in [various] categories.... This documentation has been discussed with PPO Wimmer in the past and also with him at the end of this Phase. He has been advised that a determination will be made by the Police Commissioner as to his future with this Department, based on his performance during field training.

At the end of Phase VI, Lieutenant Murphy met with Wimmer to discuss his field training. Wimmer claims that, at this meeting, Murphy told him that the "stop hatred thing didn't go over well with one of my FTOs in particular .... it didn't go over with my liberal school teacher mentality, didn't go over well with people at headquarters." During this meeting, Captain Rhodes also met with Wimmer. Rhodes remarked that "what [he] read on paper and what [he] saw in person were totally different things," because he had expected Wimmer to be less intelligent.

After Phase VI, near the end of January of 1994, a meeting took place to discuss Wimmer's continued employment with the Department. Among others present were Deputy Chief Brown, Captain Rhodes, Lieutenant Murphy, Lieutenant Williams, Sergeant Brady, FTO Hodge, FTO Gormley, and FTO Ferrante. At the meeting, Lieutenant Murphy commented that "the words Mr. Wimmer select [s] to express his thoughts tend[ ] to make others feel that he was liberal in his viewpoint." The portion of Wimmer's personal statement referring to Judge Namm was read aloud during the meeting.

After the meeting, Deputy Chief Brown directed those present to prepare internal correspondence reflecting their impressions of Wimmer. The reports from his FTOs recited familiar themes, focusing on the deficiencies in Wimmer's report writing skills, his inappropriate comments, inability to

take criticism, and "obsequious" courting of higher rank.[3] Captain Rhodes drafted a report to Deputy Chief Brown, summarizing Wimmer's field training and recommending termination. This report worked its way up the chain of command to Chief of Patrol Edwin Michel. In his memorandum accompanying the report, Deputy Chief Brown noted that "[a]lthough there are no single deficiencies or incidents of significant magnitude sufficient to warrant [Wimmer's] dismissal, collectively, there are overwhelming deficiencies and character flaws which preclude the probability that he will ever become a well-adjusted and productive police officer."

One week later, Chief Michel forwarded Deputy Chief Brown's report with a packet of supplemental materials to Chief of Department Joseph L. Monteith. Michel wrote that he "ha[d] reviewed these reports and concur[s] with Chief Brown's recommendation." Three days after receiving the report, Chief Monteith forwarded the packet to Commissioner Peter F. Cosgrove. Chief Monteith noted that "[a] quick read of his evaluation reports shows that only good things were said about him until Oct. 24th when Sgt. Brady notes '[c]ynical towards civilians and has difficulty relating to FTOs' (This was not previously noted by a FTO). After Sgts. notified, he cannot ever do anything right." The packet of materials contained Deputy Chief Brown's memorandum, the DORs, and other internal correspondence, and might have contained Wimmer's Academy record. Commissioner Cosgrove later testified that he could not recall whether a copy of Wimmer's self-introduction statement was included in the packet.

Commissioner Cosgrove referred the packet to Deputy Commissioner Robert Kearon, Cosgrove's legal advisor, for Kearon's opinion of whether there was a "problem with the

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[3]Curiously, Officer Ferrante's report begins, "I am making this report for administrative purposes only and am not waiving my right to remain silent for any criminal investigation."

pattern" and whether termination would present any legal problems. Kearon saw no problems, and Commissioner Cosgrove prepared a memorandum to the personnel bureau the next day directing it to "[p]repare [a] termination letter."

Wimmer received a letter from Commissioner Cosgrove, dated February 15, 1994, "to advise [him] that, as a result of unsatisfactory performance during [the] probationary period, his employment as a Police Officer with this Department is terminated." After his termination, Wimmer claims to have had two telephone conversations with Lieutenant Murphy in which Murphy said that Wimmer's "stop hatred thing started [him] off on the wrong foot with some of [his] FTOs." During these conversations, Murphy claims that Wimmer told him for the first time of the racist behavior of some officers in the Department.

On November 22, 1994, Wimmer initiated the present action in the United States District Court for the Eastern District of New York. He alleged that he was terminated (1) in retaliation for speaking out against racism in the Department, in violation of his rights under Title VII; and (2) for his political beliefs, in violation of 42 U.S.C. § 1983.

During discovery, Wimmer's counsel sought personnel records of certain Department officers, documentation of any civilian complaints against these officers for racially or ethnically biased behavior, and a list of Department employees who have complained of changes in the conditions of their employment for objecting to discriminatory behavior in the Department. After the Department objected, Wimmer's counsel sought the intervention of Magistrate Judge Arlene R. Lindsay to direct compliance. Magistrate Lindsay allowed in camera inspection of responsive personnel files and directed the Department to provide a list of employees who had been the subject of alleged discriminatory conduct. Wimmer sought review of the discovery order, but the district court upheld the Magistrate's rulings.

At trial, Wimmer presented five witnesses and also testified on his own behalf. He called Commissioner Cosgrove and Lieutenant Murphy as part of his case-in-chief. At the end

of Wimmer's case, the defendants moved for judgment as a matter of law on all claims. After argument on the § 1983 claim, the district court reserved decision. With regard to the Title VII claim, the following colloquy ensued:

> THE COURT: How about now on Title VII?
>
> MR. SKLAR:[4] No protected activity, your Honor.
>
> THE COURT: What do you say to that?
>
> MS. KLEIN: Your Honor, the law makes quite clear that the question is whether or not the plaintiff in this case had a good faith belief that he was opposing discriminatory practices. Mr. Wimmer testified he believed he was opposing discriminatory practices.

After confirming that the only discriminatory practices that Wimmer opposed were practices relating to people not employed by the Department, the court dismissed the Title VII claim.

In their defense, the Department and Commissioner Cosgrove presented eight witnesses, including Wimmer's Academy supervisor, FTOs Gormley, Hodge, Connoly and Ferrante, Sergeant Brady, and Deputy Chief Brown. At the end of its presentation, but before the case was submitted to the jury, the Department renewed its motion for judgment as a matter of law on the § 1983 claim. Among other grounds for the motion, defense counsel noted that

> [t]here's absolutely no connection to Commissioner Cosgrove. The two bad FTOs, Ferrante and Nolan, have never been connected to him. As a matter of fact, Judge, nobody has ever even proved that Commissioner Cosgrove was aware of any speech, whether it be protected or unprotected that Mr. Wimmer ever made.

Although Wimmer's counsel rebutted several of defense counsel's points, she made no argument respecting the Commissioner's lack of knowledge and the corresponding lack of a "policy" for § 1983 purposes.

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[4]Mr. Sklar represented the defendants at trial and Ms. Klein represented Wimmer.

The district court granted the defendants' motion. After noting that it is the Police Commissioner who creates policy in the Department, the district court acknowledged that "[s]imply going along with discretionary decisions made by one subordinate ... is not a delegation to them of the authority to make policy." The court found that "[t]here is no proof that the [C]ommissioner knew of what was going on [i]n the speech, [and therefore] there cannot be a policy making based upon speech." The district court emphasized that there was no requirement that the Commissioner investigate, and that the action was brought strictly on policy and not against any police officer individually. Finding no nexus between the arguably objectionable conduct of individual officers and the Commissioner, the district court dismissed the § 1983 claim.

On February 20, 1997, the district court entered judgment in favor of the Suffolk County Police Department and Commissioner Cosgrove. This appeal followed.

DISCUSSION

On appeal, Wimmer contends that the district court erred both substantively and procedurally in granting judgment as a matter of law to the defendants on his Title VII claim and on his § 1983 claim. We disagree.

Rule 50 of the Federal Rules of Civil Procedure allows a defendant, at any time before the case has been submitted to the jury, to move for judgment as a matter of law. The court may grant the motion if the non- moving party has failed to adduce a "legally sufficient evidentiary basis" to support his claim. Fed.R.Civ.P. 50(a); *Piesco v. Koch*, 12 F.3d 332, 340 (2d Cir.1993). Thus, a district court may grant a motion for judgment as a matter of law where there is such a complete absence of evidence that no reasonable juror could find in favor of the non-moving party. See *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir.1993). In evaluating the merits of the motion, "the court must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its

favor." *Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 203 (2d Cir.1998) (quotation omitted). We apply the same standard for judgment as a matter of law as the district court. See *Eagleston v. Guido*, 41 F.3d 865, 875 (2d Cir.1994).

I. Title VII Claim

Section 704 of Title VII prohibits an employer from "discriminat[ing] against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Section 703(a) defines an "unlawful employment practice" as follows:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. § 2000e-2(a)(1).

The district court's grant of judgment as a matter of law on the Title VII claim at the close of Wimmer's case was based on its determination that Wimmer had presented insufficient evidence to establish a prima facie case of retaliation. "To establish a prima facie case of retaliation, an employee must show '[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action.' " *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir.1998) (quoting *Tomka v. Seiler Corp..*, 66 F.3d 1295, 1308 (2d Cir.1995)). To establish the first of these elements--participation in a protected activity--Wimmer need not prove that the conditions against which he protested actually amounted to a violation of Title VII. See id. (citing *Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir.1988)). Rather, Wimmer must demonstrate only that he had a "good

faith, reasonable belief that the underlying challenged actions of the employer violated the law." *Manoharan*, 842 F.2d at 593 (quotation omitted).

We agree with the district court that Wimmer failed to establish that he was engaged in a protected activity. Wimmer's theory of recovery is that he was given poor evaluations and eventually terminated for having reported overhearing racial slurs made by police officers against black citizens and perhaps for questioning Officer Hodge's two stops of minority (Hispanic) motorists without cause. There is no claim that any of this activity was directed at Wimmer or any of his co-employees. The precise issue presented, whether a complaint of retaliation for opposing discrimination by co-employees against non-employees is cognizable under Title VII, is one of first impression in this Circuit. Several other circuits, however, have addressed analogous circumstances.

The case most closely on point is *Crowley v. Prince George's County*, 890 F.2d 683 (4th Cir.1989). In *Crowley*, a white male sued his former employer, the Prince George's County, Maryland police department, for retaliation under Title VII. See id. at 685. He claimed that his salary was downgraded for drawing attention to racial harassment in the police department. See id. At trial, the jury returned a verdict in favor of the plaintiff, and the defendants appealed after the district court denied their motion for judgment notwithstanding the verdict. See id. On appeal, the Fourth Circuit reversed. See id. at 687. The court held that the plaintiff's theory, that he had been retaliated against for "investigating instances of racial harassment perpetrated by police officers against members of the community," was not cognizable under Title VII. Id. The court's reasoning is equally applicable to the case presently before us:

> It may be that the downgrading of [plaintiff's] position by the chief of police was wrongful or even spiteful. We have emphasized, however, that Title VII "is not a general 'bad acts' statute." Rather, the conduct it prohibits is specifically set forth.... While Congress may decide to extend the statute's coverage to persons

> who bring any discriminatory practice of an employer to light, such a step lies beyond the province of the courts. To find in Title VII protection for whistle-blowers on each and every instance of discrimination on the part of an employer is more than we think the plain language of its provisions will support.

Id. (quotation omitted); see also *Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir.1997); *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir.1978) ("[N]ot every act by an employee in opposition to racial discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual.").

In the case at bar, as in Crowley, Wimmer presented evidence that certain members of the Department had acted in a discriminatory manner toward the public. He offered no evidence, however, that there was unlawful discrimination with respect to the terms and conditions of employment within the Department. In fact, Wimmer testified that he never heard a racial epithet directed toward himself or any other member of the Department during his employment. In the absence of such evidence, Wimmer's claim of retaliation is not cognizable under Title VII because his opposition was not directed at an unlawful employment practice of his employer. See *Little*, 103 F.3d at 959- 60; *Silver*, 586 F.2d at 141 ("The specific evil at which Title VII was directed was not the eradication of all discrimination by private individuals, undesirable though that is, but the eradication of discrimination by employers against employees.").

Wimmer presents two arguments in an attempt to avoid this conclusion. First, he points out, correctly, that the racist activities within the Department need not actually have been violative of Title VII, as long as he had "a 'good faith, reasonable belief' that the underlying practice was unlawful." *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir.1996) (quoting *Manoharan*, 842 F.2d at 593). We have previously applied this rule to find that a plaintiff may state a prima facie case for retaliation even when her primary claim for

discrimination is insufficient to survive summary judgment. See, e.g., *Quinn*, 159 F.3d at 768-69. In the present case, however, Wimmer could not have reasonably believed that he was opposing an employment practice because the evidence does not address racial discrimination in an employment practice. See *Manoharan*, 842 F.2d at 594 (holding that plaintiff could not have held a reasonable belief where he "neither pointed out discrimination against particular individuals nor discriminatory practices by [the employer]").

Second, Wimmer briefly claims that his actions opposed the "unlawful employment practice" of a "racially hostile work environment." We have previously recognized that a racially hostile work environment may constitute an unlawful employment practice under Title VII. See *Schwapp v. Town of Avon*, 118 F.3d 106, 110-11 (2d Cir.1997). It is inherent in the definition of a racially hostile work environment, however, that the person against whom the hostility is directed must be in an employment relationship with the employer. See *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1180 (7th Cir.1998) (rejecting retaliation claim of a white woman where she alleged she was fired for opposing racist practices in an employment agency generally but did not allege that she "was retaliated against for sticking up for the rights of black co-workers or clients"). Because Wimmer did not introduce evidence that minority employees of the Department felt that they worked in a racially hostile environment, Wimmer could not reasonably have believed that he was protesting an unlawful hostile work environment.[5]

Wimmer also raises a procedural objection to the district court's grant of judgment as a matter of law. He argues that defendants' motion, which specified "no protected activity" as its ground, was inconsistent with the specificity requirement of Rule 50(a)(2). This argument has no merit. "[T]he purpose of

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[5]Even if Wimmer had presented such evidence, it is not clear that he would have standing to bring a Title VII hostile work environment claim. See *Bermudez*, 138 F.3d at 1180.

requiring the moving party to articulate the ground on which [judgment as a matter of law] is sought 'is to give the other party an opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury.' " *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 286 (2d Cir.1998) (quoting *Baskin v. Hawley*, 807 F.2d 1120, 1134 (2d Cir.1986)). At a minimum, the judgment as a matter of law motion must "identify the specific element that the defendant contends is insufficiently supported." Id.

The defense motion clearly stated that Wimmer had failed to satisfy the first element of a prima facie case of retaliation. When viewed in the context of the entire colloquy, see *Gordeon v. County of Rockland*, 110 F.3d 886, 887 & n. 2 (2d Cir.), *cert. denied*, --- U.S. ----, 118 S.Ct. 74, 139 L.Ed.2d 34 (1997), it is apparent that Wimmer's counsel was alert to the alleged deficiencies in the case. Moreover, as Wimmer concedes in his brief, defense counsel moved for summary judgment on the same ground, giving Wimmer ample opportunity to present proof on the deficient element.

II. Section 1983 Claim

The district court granted judgment as a matter of law for the defendants on Wimmer's § 1983 claim because Wimmer failed to present evidence that the alleged deprivations of Wimmer's constitutional rights were the result of a Department policy or that the Commissioner had knowledge of the alleged deprivations. We agree and affirm on this ground.

Section 1983 permits an individual deprived of a federal right by a person acting under color of state law to seek compensation in federal court. See *Richardson v. McKnight*, 521 U.S. 399, 403, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997). To prevail on a § 1983 claim, a plaintiff must prove that the challenged conduct was attributable at least in part to a person acting under color of state law, and that the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. See *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir.1993).

When seeking to impose liability on a municipality, as Wimmer does in this case, the plaintiff must prove that a municipal "policy" or "custom" caused the deprivation. See *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (citing *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). "The policy or custom used to anchor liability need not be contained in an explicitly adopted rule or regulation." *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 870 (2d Cir.1992). Rather, actions by an official "whose edicts or acts may fairly be said to represent official policy" may expose the municipality to liability under § 1983. Monell, 436 U.S. at 694.

Even assuming that the actions of Commissioner Cosgrove were those of a policymaker,[6]y Wimmer's claim against the municipality fails nonetheless. Wimmer did not introduce evidence that the Commissioner had established a policy or custom, in a broad sense, of terminating probationary officers for their political beliefs or even of fostering an environment conducive to such actions. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) (stating that the "policy or custom" requirement means, at least, that some wrongdoing must be ascribed to municipal policymakers). And, although a single decision by a municipal policymaker may suffice to establish a "policy" or "custom" in some cases, see *Pembaur*, 475 U.S. at 480, the Commissioner's actions are not sufficient to establish an actionable "policy" or "custom" in Wimmer's individual case.

Wimmer argues that Cosgrove's acquiescence to the

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[6]The parties did not dispute, and the district court accepted, that the Commissioner was a policymaker for the Suffolk County Police Department based on the Suffolk County Charter.

"unconstitutional retaliatory conduct of his subordinates" imposes liability on the municipality, even without proof that Commissioner Cosgrove terminated him for unlawful reasons. Although in some cases a supervisor's acquiescence to actions of his subordinates may amount to a "custom" or "policy," in such a case the subordinates' "discriminatory practice must be so manifest as to imply the constructive acquiescence of senior policy-making officials." *Sorlucco*, 971 F.2d at 871. Even if some of Wimmer's FTOs and supervising officers had an unlawful motive, this motive is not reflected in the documentation that reached the Commissioner. Rather, the DORs and End of Phase reports paint the picture of a trainee who had serious difficulty performing necessary elements of his job. The documentation reviewed by the Commissioner did not manifest any discriminatory practice of Cosgrove's subordinates.

As to the Commissioner in his personal capacity,[7] Wimmer would need to establish that he "directly participated in the violation [or that he] failed to remedy the violation after learning of it through a report or appeal." *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir.1997) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986)). Wimmer fell short of proving that the Commissioner participated in the violation; indeed, there was no evidence that the Commissioner knew of Wimmer's statements regarding his organizational affiliation, heroes, or complaints about discrimination in the Department. The most favorable testimony that Wimmer's counsel could elicit from Commissioner Cosgrove was that Cosgrove "could not recall" whether Wimmer's self-introduction statement was included in the packet of materials he reviewed before making the decision to terminate Wimmer's employment. Cosgrove also testified, however, that he did not read the statement prior

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[7]It is unclear from the complaint whether Wimmer intended to sue Commissioner Cosgrove in his personal capacity. Regardless, any such claim would fail for the reasons set forth in the text.

to making the decision and that he had not spoken with any of the officers who trained or supervised Wimmer. Based on the testimony at trial, no reasonable juror could have found that Commissioner Cosgrove terminated Wimmer based on unconstitutional motives.[8]y

* * *

As a final point of error, Wimmer argues that the Magistrate Judge's rulings on discovery erroneously limited his access to personnel files of Department officers. After in camera review, the Magistrate Judge ruled that the personnel files of the FTOs did not contain any information relevant to the case and directed their return to the Department. We hold that the Magistrate Judge did not abuse her discretion in so finding. Regardless of whether the files contained information on other discriminatory activities within the Department, they could not have contained information relevant to the dispositive issues in this case.

CONCLUSION

In accordance with the foregoing, the judgment of the district court is affirmed.

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[8]Wimmer also raises an objection to the lack of specificity in the defendants' motion for judgment as a matter of law on the § 1983 claim. Defense counsel articulated several grounds for the motion in great detail at the end of the Wimmer's case, when the court deferred ruling on the motion. After the defense's presentation, defense counsel again argued the motion in great detail. Accordingly, Wimmer had adequate notice of the motion for judgment as a matter of law on his § 1983 claim.

Excerpts of Transcript of February 10, 1997

Pp. 614-16

MR. SKLAR: Your Honor, defendants respectfully request an opportunity at this time to make a motion pursuant to Federal Rule of Civil Procedure 50 for a judgment as a matter of law.

* * *

THE COURT: . . . How about now on Title VII?

MR. SKLAR: No protected activity, your Honor.

THE COURT: What do you say to that?

MS. KLEIN: Your Honor, the law makes quite clear that the question is whether or not the plaintiff in this case had a good faith belief that he was opposing discriminatory practices. Mr. Wimmer testified he believed he was opposing discriminatory practices.

THE COURT: That's on other people, right, other people not within the employment?

MR. SKLAR: Page 323 to 324 of the transcript in the record.

THE COURT: The record made that clear?

MR. SKLAR: Right

MS. KLEIN: Your Honor, the law on Title VII and retaliation is not whether in fact there was a violation under the law under the act. It's whether or nor the individual that was complaining believed in good faith that he was opposing something that's illegal.

THE COURT: I'm granting the Title VII dismissal and the state dismissal.

Excerpts of Transcript of February 11, 1997

Pp. 843-45

THE COURT: Well, first of all, we all agree that Mr. Wimmer was a probationary officer. Therefore, he could be discharged for any reason, even the wrong reason, provided it was not for the violation of his constitutional right, to wit, free speech.

Now, this action was brought against the commissioner as commissioner, and against the department. Therefore, it's based upon policy.

Now, the case cited by the plaintiff, City of St. Louis versus Prap[r]otnik, which is 108 Supreme Court 915, 1988, which has not been reversed and still stands for the proposition, that it must be a policy.

Now, who creates policy in the Suffolk County Police department? Under the charter, the police commissioner. In some instances it's boards, like a town board, the county legislators. It varies in each place. And we must look to state law according to the Supreme Court.

Under the County charter, it is the police commissioner. And under the case cited by the plaintiff, we also know from the Supreme Court on a split decision: "Simply going along with discretionary decisions made by one subordinate, however, is not a delegation to them of the authority to make policy."

There is no proof that the commissioner knew of what was going on on the speech, there cannot be a policy making based upon speech. There isn't one iota of testimony that the commissioner knew about the free speech allegation. The report submitted by the last captain doesn't even say a word about it. Nothing was said to the commissioner about that allegation.

Further, under the Prap[r]otnik decision there's no requirement that he investigate, the commissioner has to investigate. There's nothing in this case to go to the police commissioner.

And again, you've brought the action. You didn't name any police officer or any sergeant or lieutenant or captain in a 1983. You went strictly on policy.

So all of this talk about what patrolmen and sergeants and lieutenants and captains did or didn't do only affects to the degree if it's knowledgeable to the commissioner. If there's a practice going on which the commissioner should have known about.

There is one instance--and I realize the courts say one instance could create policy if it is so tied in or if there's different circumstances. Does not apply in this case.

Therefore, there is no nexus to the police commissioner with knowledge or forming a policy. He went along with the discretionary act of a subordinate to him who recommended discharge and he went along. That does not create policy. This action is strictly on policy.

Dismissed.

Supreme Court, U.S.
FILED
OCT 1 1999
CLERK

No. 99-206

IN THE

Supreme Court of the United States

PAUL WIMMER,

Petitioner,

v.

SUFFOLK COUNTY POLICE DEPARTMENT
and JOHN GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, Paul Wimmer (hereinafter referred to as "Petitioner"), was employed on March 29, 1993 as a police officer by respondents, Suffolk County Police Department (hereinafter referred to as "SCPD") and Peter F. Cosgrove, Commissioner of the Suffolk County Police Department (hereinafter referred to as "Commissioner Cosgrove"). Upon his appointment, Petitioner began serving an eighteen (18) month term as a probationary police officer. Commissioner Cosgrove terminated Petitioner on February 15, 1994 as a result of unsatisfactory performance during his probationary period (900)[1]. Petitioner, a white male, commenced this action seeking damages for civil rights violations in connection with the termination of his employment by the filing of a summons and complaint on or about November 21, 1994.

The SCPD and Commissioner Cosgrove were the only defendants named in the complaint. At trial, the SCPD was dismissed as a party and the district court allowed Petitioner to amend his complaint to add the County of Suffolk (hereinafter referred to as the "County") as a defendant (617).

Commissioner Cosgrove was only named in the caption of the complaint. The complaint did not otherwise mention Commissioner Cosgrove and did not contain a single allegation against him.

The complaint contained three federal claims: (i) a Title VII claim (Complaint, ¶¶37 and 38 at pp. 7-8); (ii) First Amendment and Fourteenth Amendment claims (Complaint, ¶¶40 and 41 at pp. 8-9); and (iii) a 42 U.S.C. § 1983 claim

---

1. Numerical references are to pages in the Joint Appendix filed with the Second Circuit Court of Appeals.

(Complaint, ¶¶43 and 44 at p.9). The complaint also alleged causes of action under the New York Executive Law (Complaint, ¶38 at p. 8) and New York Constitution (Complaint, ¶41 at pp. 8-9).

After he was terminated by Commissioner Cosgrove, Petitioner applied to be reinstated by his previous employer, the New York City Police Department (hereinafter referred to as the "NYPD") (328). As part of the application process, Petitioner prepared a statement explaining his termination from the SCPD (1129). This statement was not disclosed by Petitioner to the defense prior to trial. It was obtained by the defense on the eve of trial only after a so-ordered subpoena was served on the NYPD.

At trial Petitioner claimed that he did not recall the statement (334). He remembered it when he was confronted with it (334). In the statement, dated March 3, 1994, Petitioner told the NYPD, "[b]asically, [I] was terminated from [the SCPD] for personality difference with two field training officers out of a total of five or six" (1129). Clearly, when he was seeking to be reinstated by the NYPD, Petitioner did not claim that Commissioner Cosgrove or the County violated his civil rights.

By notice of motion dated November 25, 1996, the SCPD and Commissioner Cosgrove moved for summary judgment on the grounds that: (i) Petitioner was not engaged in protected activity under Title VII; (ii) there could be no direct action against a municipality under the First Amendment; (iii) the complaint did not plead that the alleged unlawful termination was pursuant to an official policy or custom of the County; and (iv) the state law claims were barred by the failure to serve a notice of claim. Petitioner opposed the motion for summary judgment. The district court refused to consider and decide the motion for summary judgment.

The case was tried before a jury. At the close of Petitioner's case, the district court granted a Fed. R. Civ. P. 50 motion by the County and Commissioner Cosgrove to dismiss the Title VII claim, the claim brought directly under the First Amendment and the state human rights claim. The district court reserved decision on the motion to dismiss the 42 U.S.C. § 1983 claim. At the close of the defense case, the Rule 50 motion to dismiss the 42 U.S.C. § 1983 claim was renewed and was granted by the district court. The Second Circuit Court of Appeals affirmed.

B. Statement of Facts

Petitioner came to the SCPD after what he alleged in his complaint and described in his direct testimony as "3 successful years with the New York City Police Department ("NYPD") and New York City Housing Authority Police Department ("HAPD")" (Complaint ¶9, at p.3). On cross-examination, Petitioner was confronted with evidence that he had failed to divulge during pre-trial discovery which demonstrated that he lied about his so-called "career" as a police officer before coming to the SCPD. Petitioner initially denied, then he was forced to acknowledge, that he was held over in the New York City Police Academy and was assigned to the Police Applicant Recruit Training Section for ten months for a psychological evaluation, commonly known as a "psych hold" (369-370).

While he was on "psych hold", Petitioner was engaged in activities like modeling uniforms and escorting the commanding officer of the Police Academy to ceremonial functions (177-179). After spending fifteen (15) months of his three (3) year New York City police career in the NYPD Academy (October 15, 1990-January 23, 1992) (172; 183; 1120), Petitioner finally entered a HAPD field training unit known as PBMTU(T). While he was in training, Petitioner received a critical evaluation in the area of "Human Relations" (1126):

> Officer is often to (sic) eager to assimilate with others in the squad. His actions have a tendency to make his peers uncomfortable and this alienates him from others. The afore-mentioned items have been discussed with the officer in an attempt to correct the situation.

Petitioner was assigned to a HAPD precinct on July 13, 1992 after he finished his field training (1120). After just two months at his first precinct assignment, Petitioner was attacked and injured by a young woman while he was giving her a parking ticket (193-194). Petitioner laterally transferred to the NYPD on November 30, 1992, which was slightly more than four months after he began his first precinct assignment in the HAPD (1120). He spent four (4) months in the NYPD, including at least three (3) weeks back in the NYPD Academy (196-197), before he was appointed to the SCPD on March 29, 1993.

Petitioner failed his initial psychological exam with the SCPD (371). He graduated from the SCPD Academy with a grade of 77.34 out of a minimum passing grade of 75. One of Petitioner's field training officers (FTOs) in the SCPD, P.O. Glenn M. Ferrante, who rode with Petitioner in a patrol car on eighteen tours, reported to his precinct commander on February 6, 1994, that "[t]he undersigned officer's overall evaluation of PPO Petitioner is that his ability to perform as a Police Officer is unacceptable. I believe he is an immature individual and possibly has some sort of psychological imbalance" (889). Ferrante concluded that Petitioner was "unable to properly perform the duties of a Police Officer. I strongly feel he would be a danger to himself and the public" (890; 1014; 1033). Another one of Petitioner's field training officers, P. O. James P. Gormley, reported on January 27, 1994 that:

> [Petitioner's] comments to me were sometimes bizarre, if not offending. At one point during training

> he stated that he was having an orgasm, ever since he was 5 years old he dreamed of driving a police car on the LIE [Long Island Expressway]. [Petitioner] seems to be more interested in making "contacts" in the Department than learning how to be a Suffolk County Police Officer. He was very negative towards any feedback that I gave him.

(887). Gormley also reported on October 24, 1993 that Petitioner made remarks, like "we both wear blue, and he [Petitioner] shits and pisses blue" (991; 675). Another FTO, P.O. George Hodge, reported on October 7, 1993 that Petitioner verbalized "a paramount desire to achieve higher rank", and "as this idiosyncrasy could very well alienate neighboring sector car operators I feel it is significant" (973). Hodge could not have had any knowledge of Petitioner's remarkably similar performance evaluations while he was trained at the HAPD; Petitioner withheld those evaluations from the defense.

Upon entering the SCPD Academy, Petitioner was required to submit a "Self Introduction" (849-849a). Petitioner began his self-introduction by describing his career expectation. Petitioner wrote that he wanted to become a "Detective Lietenant (sic), commanding officer of the Homicide Squad, perhaps making CAPTAIN" (849). Petitioner summed up his expectations at the end of his self introduction. He wrote that "[m]y lifetime goal is to be the Finest of the Finest in Suffolk County, P.D., and to serve after my retirement as a legislator, and a judge therefore a lifetime achievement of "excelling" in All *three branches* of government: Executive, Legislative and Judicial. I believe I have the gift of virtue" (849a). Petitioner acknowledged on cross-examination that he pursued admission into law school, but was not accepted (204). In between the description of his career goals, Petitioner described his father as "an irrational alcoholic" and "a sad example of civility" (849a). Petitioner then described himself as "an ethicist, a lover

of wisdom and justice" (849a). He wrote that "I have recently been nominated Vice President of Humanity Against Hatred" (849a). He wrote that "[m]y legal mentor is Thurgood Marshall, and my local hero is the Honorable Judge (retired) Stuart Namm for his courage to speak out on the injustices and collusion between the local police and prosecutors. I am a white male who respects and Admires All people" (849a).

On direct examination, Petitioner described what he claimed was harassment of him at the SCPD Academy. He referred to six exhibits which were internal correspondence he prepared at the direction of his instructors. Petitioner was directed to write about the meaning of the word semantics (851); about "ten codes" (852-853); about not having a uniform shirt tucked in (854); about a memobook error (855); about an improper shoe shine (858) and about submitting an arrogantly worded appeal of an examination question (873-878).

On cross-examination, Petitioner acknowledged nineteen (19) other internal correspondence that he was required to write at the police academy (850; 856-872; 875-876; 879-880; 1132-1133). They addressed deficiencies far more substantive than the untucked shirt and unshined shoes Petitioner chose to talk about on direct examination. The internal correspondence addressed Petitioner's deficiencies in understanding topics like the definition of serious physical injury (856); when a police officer can enter a home to make an arrest (866); the elements of burglary in the second degree (869-872; 879) and improper handcuffing technique (880).

According to Petitioner, he did not think he did anything wrong when he was required to write many of the internal correspondence at the police academy (223). Petitioner believed that the instructors were trying to make him resign (223). On cross-examination, Petitioner admitted that he only testified on direct examination about the two high test scores he received at the academy (225-226). Petitioner acknowledged that he also

received poor test scores and that he graduated close to the bottom of his academy class with a final grade of 77.34, which was 2.34 points away from failing out of the police academy (225-227).

After barely graduating from the police academy, Petitioner began field training. Petitioner was trained for eighteen (18) weeks at two precincts — the Fifth Precinct and the Sixth Precinct. He was trained by eleven police officers who served as Field Training Officers (FTOs) and drove in a patrol car with Petitioner. Those FTOs were Police Officers Pitts (949-966); Roche (967-968; 974-978; 978-983); Hodge (972-973); Ryan (976-977); Gormley (984-991); Ferrante (997-1000; 1003-1010; 1013-1016; 1020-1035; 1038-1041; 1042-1044); Hatton (1001-1002); Tucker (1011-1012); Fountain (1036-1037); Nolan (1045-1048; 1051-1060; 1063-1068; 1072-1099) and Brierton (1049-1050; 1061-1062). Phases I (3 weeks) and II (3 weeks) of Petitioner's field training at the Fifth Precinct were evaluated in end of phase reports prepared by one sergeant, Terrence Brady (969-971; 992-996; 886; 902; 701-708). Brady was the only sergeant who evaluated Petitioner's field training. Phase II was also evaluated in writing by Lt. William Murphy (901; 589-590). Phases III (3 weeks) and IV (3 weeks) of Petitioner's field training at the Sixth Precinct were evaluated in end of phase reports prepared by Lt. Joseph Williams (1017-1019; 1042-1044).

Petitioner's field training during Phases I, II, III and IV was also evaluated by the SCPD Deputy Chief of Patrol, Russell Brown, by the Sixth Precinct's Commanding Officer, Inspector Philip Robilotto, by Deputy Inspector Robert Gould of the Sixth Precinct and by Captain James Rhoads from the Chief of Patrol's Office (893). Petitioner was categorized at the "minimum acceptable" level for Phases I and II (892). After rounding off grades in 17 of 32 categories in Phase III to the next highest number, Petitioner was again placed in the "minimum

acceptable" category (893). At the end of Phase IV, Petitioner was unacceptable in the majority of categories (893). Other criticisms of Petitioner included his obsession with making rank; his inability to accept criticism and feedback; an unacceptable attitude towards the public; his tendency to become argumentative with his field training officers; he was overly talkative about inappropriate items and his inability to handle paperwork involved with the job (892-893). Based on the foregoing, it was decided to extend Petitioner's field training by two (2) complete phases (6 more weeks) and to send him for two (2) days of intensive remedial training at the Police Academy (893; 881-882; 903-904).

On cross-examination, Chief Brown explained why Petitioner's field training was extended (824-825):

> It was decided that we were going to give him two extra phases of training. This was to give him the best opportunity to get the most out of our training to be a police officer.
>
> We were trying to salvage the officer, and it was my determination that we would do extra field training to that goal.

Phase V of Petitioner's extended field training was evaluated in an end of phase report prepared by Lt. Joseph Williams (1069-1071). Phase VI was evaluated in an end of phase report prepared by Lt. William Murphy (1100-1102).

During Phases V and VI, Petitioner was criticized for unacceptable paperwork, for over-talkativeness and inappropriate remarks and for derogatory comments about civilians, fellow officers and supervisors (894; 908-909). In the daily observation report for December 21, 1993, P.O. Brierton commented that Petitioner had apparently witnessed a motor

vehicle accident occur, and Petitioner "was going to disregard actions of one vehicle, which was apparently over a double, solid yellow line because operator stated she knew Lt. Jantzen" (1062). In the daily observation report for December 24, 1993, P.O. Nolan wrote that Petitioner "failed to find a potential weapon (sm. survival type pocket knife) on DWI prisoner during initial search after cuffing" and that Petitioner "also failed to stay w/susp./prisoner at MVA after being told to do so by" P.O. Nolan (1068). Both of those daily observation reports were noted by Captain Rhoads in his summary of Petitioner's field training dated January 24, 1994 which recommended to Rhoads' superior, Chief Brown, that Petitioner be terminated (905-910). In a second report dated February 4, 1994 to Chief Brown, Rhoads noted that at the conclusion of six (6) phases (18 weeks) of field training, including two (2) days of special remedial training at the police academy, it was decided that Petitioner's field training would end because "nothing would be gained by continuing his field training" (894).

Petitioner testified that he met with Captain Rhoads at the end of Phase VI (140-145). Petitioner did not testify that he told Rhoads that he was being retaliated against by other police officers. Similarly, Petitioner did not complain to Captain Rhoads about any racial slurs or the targeting of Hispanic motorists.

On January 24, 1994, another meeting was held to discuss Petitioner's future with the SCPD. This meeting was called by Chief Brown (835) and was attended by Brown, Captains Rhoads and Gabriel, Lieutenants Murphy and Williams, Sergeant Brady and P.O.'s Friedrich, Ferrante, Gormley, Hodge and Pitts (836, 894). Brown testified on cross-examination that the attendees were determined based on who was working on the day of the meeting (836). Brown explained the purpose of the meeting (836-837): "I wanted to talk to the officers and supervisors who were directly involved in [Petitioner's] field

training to see what level we had gotten to, whether there were any additional steps that we could take to salvage this officer." Captain Rhoads summarized the meeting in his memorandum of February 4, 1994 (894):

> At the conclusion of the meeting, a unanimous agreement was reached that PPO Wimmer's performance could not be brought up to an acceptable level and the potential for this officer to expose the department to complaints, and possible lawsuits, presented an unacceptable risk. Therefore, he should not be put on the street. It was also agreed that a recommendation for termination should be sent to the Commissioner.

On direct examination, Chief Brown summarized his knowledge of Petitioner's training and performance (794-795):

> He was having the same problems, he was having problems dealing with the public, he was almost contemptuous about the public, he was cynical about them.
>
> He was having problems dealing with his field training officers, he wasn't doing what they were telling him to do. He would become argumentative with them every time they tried to give him some constructive criticism and generally not take any direction from them.
>
> He was also deficient in certain things that we wanted him to do. He was not able to properly prepare his field reports or some of the other general reports that we do on a daily basis. He was having some problems with officer safety.

> He was also having problems with talking too much to the public. He would get out, he would be saying things to the public that had no bearing on the incident at hand and in some instances people found offensive.

Brown decided that Petitioner was not suited to be a SCPD police officer and decided to recommend to Commissioner Cosgrove that Petitioner be terminated (796; 813). Brown was asked to explain the reasons for his decision and gave this answer (796):

> Again, he was having problems with the public, he wasn't responding to training and he wasn't getting along with his field training officers and in fact he wasn't getting along with a lot of the officers.

Brown's recommendation to terminate Petitioner was sent up through the chain of command to Commissioner Cosgrove. In a memorandum to his superior, Chief of Patrol Edwin Michel, Brown attached a report prepared by Captain Rhoads which summarized Petitioner's professional deficiencies and the significant unsuccessful attempts to correct those deficiencies (891-894). Brown wrote (891):

> Although there are no single deficiencies or incidents of significant magnitude sufficient to warrant his dismissal, collectively, there are overwhelming deficiencies and character flaws which preclude the probability that he will ever become a well-adjusted and productive police officer. This conclusion was reached after attending roundtable discussion with numerous people who were involved in this officer's field training and reviewing reports subsequently submitted by those participants.

Brown stated that his recommendation was not based upon Petitioner's ideology or membership in any organization (797). In fact, Brown did not even know what Petitioner's ideology was or what organizations he belonged to (797). Brown never spoke to Commissioner Cosgrove about Petitioner. Brown was not ordered to concoct a scheme to railroad Petitioner out of the SCPD (797). Brown had no reason to believe that his subordinates, the FTOs, the field training coordinators or Captain Rhoads fabricated a scheme to railroad Petitioner out of the SCPD for exercising his constitutional rights (797). Lt. Murphy (597-598); P.O. Friedrich (627-628); P.O. Hodge (652-653); P.O. Gormley (672-674); Sgt. Brady (708-710) and P.O. Ferrante (763-764) all testified in similar fashion. They also refuted Petitioner's allegations and explained their actions.

Brown's recommendation was passed up the chain of command to his superior, Chief of Patrol Edwin Michel (896). Michel passed it to his superior, Chief of Department Joseph Monteith (896). Monteith passed it to his superior, Commissioner Cosgrove. Cosgrove then directed that a termination letter be prepared (895; 900).

Petitioner called Commissioner Cosgrove to testify on his case in chief. Under questioning by Petitioner's counsel, Cosgrove explained that in cases of termination, he receives a package of documents which he examines to see if there was a general consensus that he take action. In Petitioner's case, Cosgrove remembered that he read many of the daily observation reports on Petitioner's field training (418-419). Cosgrove acknowledged (404-406) having seen memos from Monteith, Michel and Rhoads (895-899) before he gave the command to terminate Petitioner (408). Cosgrove also discussed Petitioner's termination with Deputy Police Commissioner Robert Kearon, who served as Cosgrove's legal adviser. Kearon told Cosgrove that "he saw no problem with it" (410). Cosgrove said that he never spoke with anybody that trained Petitioner, and never

spoke with any sergeants or lieutenants (410). Petitioner's counsel asked Cosgrove if he ever heard that Petitioner made allegations that there was discriminatory conduct going on within the Police Department (414). Cosgrove responded, "No" (414). Cosgrove remembered that there were a lot of daily observation reports in the package he was given with the recommendations from his commanding officers to terminate Petitioner (418). Cosgrove believed that the package might have included other memos and Petitioner's police academy record (418). Cosgrove also testified that he did not recall if Petitioner's personal statement was included (418).

Petitioner called Captain (formerly Lieutenant) William Murphy to the stand. Murphy stated that he did not have a belief as to Petitioner's political affiliations (572). Murphy believed that at times Petitioner made others feel that he was liberal in his viewpoints (573). Murphy told Petitioner that he had a school teacher mentality (573) and that it was a possibility, "communication wise", that Petitioner started off on the wrong foot with other police officers (574-575). Murphy asked Captain Rhoads to meet with Petitioner because Murphy could not describe Petitioner on paper (575-576). Murphy testified that Petitioner never complained to him about his field training officers using bad adjectives when speaking about minorities, or about targeting minority motorists and making illegal car stops until after Petitioner was terminated (576-577).

At the end of Phase VI, Petitioner told Murphy that he had not been shown the daily observation reports (578). Murphy then let Petitioner make copies of the reports (579). Murphy attended Chief Brown's meeting on January 24, 1994 (580-585). According to Murphy, "Chief Brown had called that meeting to get facts and answers to questions that he had regarding Mr. Wimmer's employment so that he would be able to make a recommendation to the commissioner as to whether to terminate or to retain Mr. Wimmer" (581).

On cross-examination, Murphy testified (595-596) that at the end of Phase VI he received from Petitioner a "Field Training Program Critique" (1138) and a "Recruit Field Training Guide" (1140-1148). In his written critique of the field training program, Petitioner did not mention anything about discrimination taking place (597; 1138). Similarly, Petitioner did not mention anything about being singled out or retaliated against (597; 1138). There was room on the form for those comments, or Petitioner could have written an internal correspondence to document those allegations (610). Murphy recommended that Petitioner be terminated based on his review of the daily observation reports and end of phase reports from all six phases, and his review of internal correspondence written by or about Petitioner and his discussions with Petitioner (599). Murphy stated that:

> [i]t became clear to me that Mr. Wimmer was not able to learn from his field training officers that a constant barrier to effective communication between the two was always present. He proved over and over that he just did not get a grasp of what the training process was all about.

(599-600).

On cross-examination, Petitioner testified that he enjoyed working for the NYPD and HAPD and thought that, "for the most part", they were professional (172). Later on cross-examination, Petitioner acknowledged that he had described the NYPD as "an unprofessional police agency" in internal correspondence he wrote while at the SCPD Academy (217-218; 850).

Discussing his claim for damages, Petitioner testified that some of the medical symptoms of the trauma he suffered as a result of being fired happened immediately after he was fired [February 15, 1994] (338). Headaches, throwing up and not

being able to eat started almost immediately, within a week of being fired (338). Loss of interest in outside activities started gradually, approximately two weeks after (338-339). Depression began within a week or so (339). Stomach problems, sleeping problems, impotency and anxiety and fear began within a week of his termination (339-340). Petitioner was then confronted with another document that he withheld from the defense until it was obtained from the NYPD on the eve of trial. The document was a medical questionnaire that Petitioner filled out and submitted to the NYPD on March 9, 1994 when he applied for reinstatement to the NYPD (1130). Petitioner stated, "I have nothing to report since my last full medical on August 25, 1992" (1130). Petitioner did not report any of his alleged trauma and medical conditions to the NYPD even though the medical questionnaire required him to respond truthfully and completely in order to be reinstated as a member of the NYPD (341-342).

PERCEIVED MISSTATEMENTS MADE IN THE PETITION

Petitioner alleges in his Petition for a Writ of Certiorari (hereinafter referred to as "the Petition") at page 2 that "[t]here was considerable evidence that a large number of officers had conspired to bring about petitioner's dismissal because they objected to his opposition to discrimination", and that the so-called conspirators "had hidden their motives from the Police Commissioner . . .". Those conclusory allegations are unsupported by the record. Indeed, the petitioner's complaint did not even allege the existence of any such conspiracy or attempt to state a claim based upon a conspiracy. Moreover, the petitioner did not raise and the courts below did not consider any conspiracy theory. *See Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215, __ (1998); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681, 90 L. Ed. 2d 19, __ (1986).

The Petitioner also purports to set forth the geographic jurisdiction of the SCPD and the racial demographics of Long Island. *See* Petition at page 3. There is no evidence of record on the racial composition of Long Island. In addition, the SCPD only has jurisdiction over parts of the five towns in the western part of Suffolk County, and it has no jurisdiction over the five towns in the eastern portion of the County.

Petitioner claims that "[r]acial issues arose throughout petitioner's training period." *See* Petition at page 4. This is an embellishment of the record. According to Petitioner's trial testimony, he heard the word "moulee" used one time while he rode with P.O. Pitts during Phase I (86-87). Petitioner never testified that he complained to anyone about the use of that word. Petitioner also testified that P.O. Hodge issued traffic tickets to Hispanic motorists without any cause on two occasions during Phase II (94-96; 99-100). According to Petitioner, he heard the word "niggers" used over the police radio one time during Phase II of field training (111). Petitioner did not tell any superior officers about the use of discriminatory language until he allegedly told Lt. Williams when he got to the Sixth Precinct for Phases III-VI (113). The record shows that Petitioner received critical narrative evaluations from P.O.'s Hodge, Ryan and Gormley before he arrived at the Sixth Precinct (972-973; 976-977; 988-991). Petitioner testified that he heard the work "spook" used two times during Phase III. Petitioner did not testify that he heard or observed any other racial slurs or incidents during Phases IV, V and VI. Petitioner acknowledged on cross-examination that he never documented any of those incidents (284-285; 293-295). Petitioner also acknowledged on cross-examination that none of the alleged racial incidents he observed, and none of the racial epithets he allegedly heard, was ever directed towards him or any members of the SCPD (323-324).

Petitioner's assertion that the alleged remark to him that demanded "whose side am I on anyway" had something to do

with assistance that he provided to an African-America family is unfounded in the text of the referenced transcript page (*See* February 4, 1997 at pp. 49-50).

On oral argument before the district court on the Respondents' Rule 50 motion, where the facts must be viewed in the light most favorable to the Petitioner, Respondents' counsel briefly described Police Officers Ferrante and Nolan as "the bad F.T.O.'s" based solely upon the Petitioner's testimony. Now, the Petitioner is unfairly trying to turn that description into some kind of an admission through the use of the phrase "candidly characterized." *See* Petition at p. 5.

Petitioner also mischaracterizes the record and the decision by the Second Circuit when he states that "Instead, the Commissioner asked his legal advisor whether there was a 'problem with the pattern' of concerted, apparently pretextual negative evaluations and whether as a result termination 'would present any legal problems'." *See* Petition at p. 7. The text that appears between the two quoted fragments of Commissioner Cosgrove's testimony has been fabricated by the Petitioner and has no basis in the record.

Petitioner also resorts to the use of scandalous and inflammatory statements that have no basis in the record. The entire statement at page 22 of the Petition, beginning with the remarks about the SCPD's "long, troubled history" and ending with the remarks about "a preemptive strike", are outrageous remarks that are not supported by any evidence in the record. Petitioner also falsely asserts that "[t]here was substantial evidence of widespread animus within the Suffolk County Police towards officers who opposed discrimination or reported misconduct, the all too common 'blue wall of silence . . .'." *See* Petition at p. 26. The record is completely devoid of any evidence to support that claim and the unwarranted *ad hominem* attack contained therein. Moreover, this assertion was not raised by the Petitioner in the courts below.

Perceived misstatements of law in the Petition will be addressed in the Reasons for Denying the Writ section of this Brief in Opposition.

REASONS FOR DENYING THE WRIT

THE PETITIONER HAS FAILED TO ESTABLISH JURISDICTION FOR REVIEW OF THE ORDER APPEALED FROM AS REQUIRED BY RULE 10 OF THIS COURT

A. The Courts Below Correctly Applied The Good Faith, Reasonable Belief Inquiry To The Petitioner's Opposition Clause Claim Under Section 704(a) Of Title VII.

The Petitioner was the beneficiary of a broad interpretation of the "opposition clause" of Section 704(a) of Title VII. 42 U.S.C. § 2000e-3(a). Under that broad interpretation, to prove that he engaged in protected activity, an employee need not establish that the conduct he opposed was in fact a violation of Title VII. The employee must, however, demonstrate that he had a good faith, reasonable belief that the underlying challenged actions of the employer violated Title VII. *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1177-1179 (2d Cir. 1996); *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988). In Petitioner's briefs to the Second Circuit, he cited to many of the cases that are also cited in his Petition and he variously described this rule as a "well established principle" (*see* Petitioner's main brief at p. 22) and as "the well settled principles of law which govern in this Circuit, and the majority of other Circuits" (*see* Petitioner's reply brief at p. 2). Petitioner has now abandoned the arguments that he advanced in the courts below and he has decided instead to characterize the prevailing case law as "sharply divided" and as "a trap for the unwary" that is replete with "loopholes". *See* Petition at pp. 8-9.

Petitioner should not be permitted to now attack for the first time in this Court the very same caselaw that he embraced in the courts below. *See Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-213, 118 S.Ct. 1952, 1956, 141 L. Ed. 2d 215, __ (1998); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681, 90 L. Ed. 2d 19, __ (1986). The Petitioner's reversal of position, combined with what can be fairly described as a meandering legal argument that is characterized by a misapprehension of the cited caselaw, is an attempt to mask the fact that the Petitioner's real disagreement is with the conclusion by the courts below that no reasonable juror could have concluded that the Petitioner had a good faith, reasonable belief that the conduct he complained about constituted an unlawful employment practice of the SCPD. The courts below, however, correctly applied the prevailing jurisprudence on Title VII "opposition clause" retaliation claims and properly rebuked the Petitioner's attempt to turn that clause into a general bad acts statute. *See Crowley v. Prince George's County*, 890 F.2d 683, 685-687 (4th Cir. 1989), and *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978). Even though both *Crowley* and *Silver*, *supra*, were relied on by the Second Circuit in its decision in this case, the Petitioner has neither cited nor discussed those decisions in his Petition.

This is not a case involving a "real and embarrassing conflict of opinion and authority between Circuit Courts of Appeal." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S. Ct. 614, 620, 99 L. Ed. 2d 897, __ (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 2d 717 (1923) (considering the meaning of the phrase "special and important reasons" within the context of the former version of Rule 10 of the Supreme Court Rules). The Circuit Courts of Appeal have not had any difficulty applying the good faith, reasonable belief inquiry to section 704(a) "opposition clause" retaliation claims. *E.g.*, *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d

956, 959-960 (11th Cir. 1997); *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962, 966-967 (7th Cir.), *cert. denied*, 481 U.S. 1017, 107 S. Ct. 1895, 95 L. Ed. 2d 502 (1987); *Love v. RE/MAX of America*, Inc., 738 F.2d 383, 385 (10th Cir. 1984); *Sisco v. J.S. Alberici Construction Company*, 655 F.2d 146, 150 (8th Cir.), *cert denied*, 455 U.S. 976, 102 S. Ct. 1485, 71 L. Ed. 2d 688 (1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1138 (5th Cir.), *cert. denied*, 455 U.S. 1000, 102 S. Ct. 1630, 71 L. Ed. 2d 866 (1982). Contrary to the Petitioner's contention, the lower courts are not sharply divided over the scope of the protection afforded by section 704(a). None of the cases cited by the Petitioner, including *Hedgepeth v. Kaiser Foundation Health Plan of the Northwest*, 76 F.3d 386, 1996 WL 29252 (9th Cir. 1996) (decision without reported opinion) and *Parker v. Baltimore and Ohio Railroad Company*, 652 F.2d 1012 (D.C. Cir. 1981), support that proposition.

The Petitioner struggles to articulate a ground for granting the petition notwithstanding the settled state of the applicable case law. His arguments are not persuasive and should be rejected.

The good faith, reasonable belief inquiry that was applied by the Second Circuit in this case under section 704(a) is consistent with Title VII's central purpose, which is the elimination of employment discrimination by informal means. *Little v. United Technologies, Carrier Transicold Division*, *supra*, 103 F.3d at 960 (11th Cir. 1997); *Payne v. McLemore's Wholesale & Retail Store*, *supra*, 654 F.2d at 1137-1138 (5th Cir.), *cert. denied*, 455 U.S. 1000, 102 S. Ct. 1630, 71 L. Ed. 2d 866 (1982); *Berg v. LaCrosse Cooler Company*, 612 F.2d 1041, 1045-1046 (7th Cir. 1980). The Petitioner's contention that Title VII is jeopardized by a decision that is consistent with the prevailing case law is illogical. The Petitioner prefers a rule that would dilute the good faith, reasonable belief inquiry to the point where it would become "no more than speculation

regarding [an employee's] subjective knowledge." *Harper v. Blockbuster Entertainment Corporation*, 139 F.3d 1385, 1388 n.2 (11th Cir. 1998). The Circuit Courts, however, have refused to eviscerate the reasonableness inquiry because to do so would encourage employees to immunize themselves from discharge or discipline by filing utterly baseless charges of discrimination. *Holland v. Jefferson National Life Insurance Company*, 883 F.2d 1307, 1315-1316 (7th Cir. 1989); *Booker v. Brown & Williamson Tobacco, Inc.*, 879 F.2d 1304, 1312-1314 (6th Cir. 1989); *Parker v. The Baltimore and Ohio Railroad Company*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) ("The employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate a good faith, reasonable belief that the challenged practice violates Title VII.").

The Petitioner's argument that the Courts of Appeals have "fashioned three related loopholes", which the Petitioner alternatively describes as employer defenses (*see* Petition at pp. 8-9), is erroneous.

An employee seeking the protection of the "opposition clause" bears the burden of demonstrating a good faith, reasonable belief that the challenged practice violates Title VII; an employer does not have any burden to raise a defense or a "loophole" to an otherwise baseless opposition clause claim. *Little v. United Technologies, Carrier Transicold Division*, *supra*, 103 F.3d at 960 (11th Cir. 1997); *Parker v. The Baltimore & Ohio Railroad Company*, *supra*, 652 F.2d at 1020 (D.C. Cir. 1981). The courts below correctly found that the Petitioner failed to produce any evidence from which a reasonable juror could conclude that he held a good faith, reasonable belief that the challenged practices violated Title VII. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998). Indeed, the Petitioner did not offer any evidence at all that he subjectively believed that the SCPD was engaged in any unlawful employment practices and that his belief was objectively

reasonable. The only evidence of record on the pertinent good faith, reasonable belief inquiry consists of the Petitioner's admissions, which were brought out during his cross-examination by the Respondents, that none of the objectionable conduct was directed towards him or towards other employees of the SCPD. The Petitioner attempted to compensate for this glaring lack of evidence in the courts below by misconstruing certain caselaw. The Petitioner has repeated this tactic in his Petition by setting forth an argument that misapprehends the courts' holdings in *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971) and in *Moyo v. Gomez*, 40 F.3d 982 (9th Cir.), *amending*, 32 F.3d 1382, *cert. denied*, 513 U.S. 1081, 115 S. Ct. 732, 130 L. Ed. 2d 635 (1995), and by misquoting a portion of this Court's decision in *Meritor Savings Bank v. Vinson*, 447 U.S. 57, 66, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49, __ (1971). *See* Petition at p. 10.

The case of *Rogers v. E.E.O.C.*, *supra*, came to the Fifth Circuit "in a preliminary and undefinitive posture." 454 F.2d at 236. The employer asked the district court "to limit at the threshold the investigative scope of the [E.E.O.C.] on the ground that the Commission seeks evidence of a discriminatory employment practice which is not proscribed by Title VII . . .". *Id.* The employee's indefinite charge of discrimination appeared to assert a claim based in part on the employer's alleged discriminatory treatment of patients. The Fifth Circuit refused to prohibit the E.E.O.C. from investigating certain patient records that were pertinent to that allegation. The court did not hold that discriminatory conduct directed towards non-employees is actionable as the basis of an "opposition clause" claim by an employee who witnessed and opposed that conduct. Rather, the court held:

> that an employer's patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees.

> As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees.

454 F.2d at 239. The court allowed the E.E.O.C. to investigate whether or not the employer's treatment of patients was evidence of a "subtle" or "sophisticated" method of discriminating against its employees. 454 F.2d at 240-241. Clearly, the Petitioner has misapprehended the Fifth Circuit's holding in *Rogers v. E.E.O.C.* This error is compounded by the fact that the Petitioner has misquoted *Meritor Savings Bank v. Vinson*, *supra*, 477 U.S. at 66, 106 S. Ct. at 2405, 91 L. Ed. 2d at __, by deleting the words "for employees" from the quoted text, which should read: "that her employer created an offensive work environment **for employees** by giving discriminatory service to its Hispanic clientele." The Petitioner's errors improperly diminish the fact that even conduct directed towards non-employees must be connected in some way to an unlawful employment practice, be it overt, subtle or sophisticated, that victimizes employees.

The Petitioner's reliance on *Moyo v. Gomez*, 40 F.3d 982 (9th Cir.), *amending*, 32 F.3d 1382, *cert. denied*, 513 U.S. 1081, 115 S. Ct. 732, 130 L. Ed. 2d 635 (1995) is also misplaced. In that case, the Ninth Circuit reinstated the dismissed complaint and held, in pertinent part, that the plaintiff corrections officer could have had a reasonable belief that the prison inmates who were allegedly being mistreated qualified as employees protected by Title VII because, in certain circumstances, prison inmates can be considered as "employees" who are protected by Title VII. 40 F.3d at 985. Once again, and in accordance with settled Title VII "opposition clause" jurisprudence, the ultimate inquiry is always on whether or not the employee reasonably believed that the unlawful practice was an unlawful employment practice under Title VII.

Based on the foregoing discussion, the Second Circuit correctly held that "[b]ecause [Petitioner] did not introduce evidence that minority employees of the Department felt that they worked in a racially hostile environment, [Petitioner] could not reasonably have believed that he was protesting an unlawful hostile work environment." *See* Appendix at p. 17a.

The Petitioner also erroneously claims that the Circuit Court decisions utilize a "retrospective methodology" which improperly limits "opposition clause" claims by the application of caselaw decided after the conduct that was complained of. *See* Petition at p. 11. This argument is unfounded. For example, in *Lanaux v. Central New York Psychiatric Center*, 152 F.3d 919 (2d Cir. 1998) (decision without reported opinion), *cert. denied*, __ U.S. __, 119 S. Ct. 382, 142 L. Ed. 2d 316 (1998), the court simply held that the employee's complaints "about the treatment of minority patients were unrelated to any unlawful employment practice, and therefor the making of such statements was not protected activity." That holding was correct, it did not break any new ground, and it certainly did not apply a change in the law "retrospectively" to defeat the employee's claim that she had a good faith, reasonable belief that the practice was an unlawful employment practice at the time she opposed it. In *Manoharan v. Columbia University College of Physicians and Surgeons*, *supra*, 842 F.2d at 594 (2d Cir. 1988) and in *Mayo v. Kiwest Corp.*, 94 F.3d 642 (4th Cir. 1996) (decision without reported opinion), each of the Circuit Courts expressly reviewed the issue of the employees' objectively reasonable beliefs based on the state of the law at the time the employees engaged in the alleged protected activities. There is no division among the Circuit Courts on this approach, and the caselaw shows that the employee is always given the benefit of every doubt on the question of the objective reasonableness of his belief at the time of the conduct complained of, and is not prejudiced by later changes in caselaw. The Petitioner cites to *Harper v. Blockbuster Entertainment Corporation*, 139 F.3d 1385 (11th Cir. 1998) in an effort to further illustrate what he

characterizes as "the limitations of the protection afforded to complainants by this rule . . .". *See* Petition at p. 14. Presumably, the Petitioner's reference to "this rule" is intended to be a reference to the "retrospective methodology" rule that he has concocted. *Harper*, however, does not support the Petitioner's contention. The Petitioner has also mischaracterized the court's decision by stating that "the Eleventh Circuit stressed that at the time of that objection several circuits had agreed that such grooming standards were legal under Title VII" (*see* Petition at p. 14). The clear implication from this statement is that some circuits had a contrary view of the law. The court's decision, however, was not equivocal: "Every circuit to have considered the issue [on grooming standards] has reached the same conclusion reached by this Court . . .". 139 F.3d at 1388.

The Petitioner's remaining arguments on the "opposition clause" issue suffer from the same infirmities discussed above. Those arguments are equally without merit, and they fail to set forth any basis for granting the Petition.

B. This Court's Decisions In *Monell v. New York City Department Of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), And In Its Progeny, Should Not Be Overruled.

The Petitioner's request that the Petition be granted for the purpose of overturning or clarifying *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and its progeny, should be denied. In his brief to the Second Circuit, the Petitioner argued that he established municipal liability under *Monell* and its progeny, including *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). *See* Petitioner's main brief at pp. 27-40, and Petitioner's reply brief at pp. 7-11. Because the Petitioner embraced *Monell* and its progeny in the courts below, he cannot now argue in support of his Petition that certiorari should be granted to overrule those cases. *See Pennsylvania*

Department of Corrections v. Yeskey, supra, 424 U.S. at 212-213, 118 S. Ct. at 1956, 141 L. Ed. 2d at __; *Equal Employment Opportunity Commission v. Federal Labor Relations Authority, supra*, 476 U.S. at 24, 106 S. Ct. at 1681, 90 L. Ed. 2d at __ (1986). In addition, there is no basis in the record in this case that warrants undertaking a task as monumental as redefining the jurisprudence of municipal liability under 42 U.S.C. § 1983 and adopting the rule of *respondeat superior* liability for § 1983 claims. *See Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

CONCLUSION

For all the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari from the Order of the United States Court of Appeals for the Second Circuit, dated May 5, 1999, be denied in its entirety.

Respectfully submitted,

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(3)

No. 99-206

In The

SUPREME COURT OF THE UNITED STATES

PAUL WIMMER,

Petitioner,

v.

SUFFOLK COUNTY POLICE DEPARTMENT
and JOHN GALLAGHER,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITIONER'S REPLY BRIEF

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(1) The question presented by the petition was specifically litigated by the parties in the court below, and was the dispositive issue in decision of the Second Circuit.

In the court of appeals respondents successfully contended that a complainant enjoys no statutory protection under § 704(a) if his complaint is grounded on a misapprehension of the scope or commands of Title VII itself. Respondents insisted that a complainant's good faith belief that he was opposing illegal discrimination would be irrelevant if "the conduct complained of simply wasn't an unlawful employment practice under Title VII."[1]

> [T]he reasonable good faith component can only apply to conduct otherwise covered by Title VII. To hold otherwise would be to allow unrestricted access to the federal courts, via Title VII, . . . regardless of whether or not that conduct was proscribed by Title VII.[2]

Respondents argued that they were entitled to prevail because

> the conduct complained of, even if accepted as fact, simply did not constitute an employment practice at all, and any belief held by Wimmer that it was an employment practice was not reasonable *as a matter of law*.[3]

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[1]Brief for Defendants-Appellants Suffolk County Police Department, No. 97-7321 (2d Cir.), p. 33. The authority cited by respondents for this assertion was *Manoharan v. Columbia University of Physicians & Surgeons*, 842 F. 2d 590 (2d Cir. 1988). The petition recognized that that was precisely the rule in *Manoharan*. Petition, p. 11.

[2]*Id.* at 34; see *id.* at 33("Nowhere in this Court's opinion [in *Reed v. A.W.Lawrence & Co., Inc.*, 95 F. 3d 1170 (2d Cir. 1996)] was the plaintiff relieved of demonstrating that the action complained of must be cognizable under Title VII.")

[3]*Id.* at 27 (emphasis added).

Respondent's contention that a complaint was to be assessed in light of a *correct* interpretation of Title VII's substantive commands was consistent with prior Second Circuit § 704 cases, as well as with decisions in Fourth and Sixth Circuits. See Petition, 11-12.

On the other hand, petitioner in the court of appeals insisted that a Title VII complainant is protected by § 704 even if his or her complaint involves a mistake of law. Petitioner specifically relied on the Ninth Circuit decision in *Moyo v. Gomez*, 32 F. 3d 1382 (9th Cir. 1994), quoting its holding that

> an erroneous belief that an employer engaged in an unlawful employment practice is reasonable, and thus actionable under § 704(a), if premised on a mistake made in good faith . . . [A] good faith mistake may be one of fact *or of law*.[4]

We urged that the contrary standard, which had been applied by the district court and was advanced by respondents, would be unfair to employees untutored in the law.

> In making the determination whether plaintiff had . . . a reasonable belief, it is immaterial that plaintiff may not have an intimate understanding of the legal import of Title VII. Whether a complaint was asserted in good-faith will be determined by the jury in part by the extent of the plaintiff's legal sophistication, making due allowance for the limited knowledge of most Title VII plaintiffs. . . . [I]f the

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[4]Reply Brief for Plaintiff-Appellant Paul Wimmer, No. 97-7321 (2d Cir.), pp. 5-6 (*quoting Moyo v. Gomez*, 32 F. 3d at 984)(emphasis added).

district court decision is sustained it would be penalizing [petitioner] for lacking legal expertise.[5]

Our argument was consistent with the prevailing rule in the Ninth and District of Columbia Circuits. Petition, pp. 14-16.

The Second Circuit squarely resolved this legal dispute in favor of respondents. The court of appeals eschewed any inquiry as to whether petitioner actually believed the practices he opposed were illegal, or into what the state of Title VII law might have been in 1994, when petitioner complained about discrimination. The sole and controlling issue, the court of appeals insisted, was whether the actions about which petitioner had complained would, if they had occurred, have *actually* violated Title VII.

> " . . . The opposition must be directed at an unlawful employment practice . . . ." . . . Wimmer presented evidence that certain members of the Department acted in a discriminatory manner toward the public. . . . Wimmer testified he never heard a racial epithet directed toward himself or any other member of the Department during his employment. In the absence of such evidence, Wimmer's claim of retaliation is not cognizable under Title VII *because his opposition was not directed at an unlawful practice* of his employer.

(App. 16a)(Emphasis added).

In their Brief in Opposition, respondents contend that "[t]here is no division among the Circuit Courts" regarding how to treat a complainant's error of law in a § 704(a) case. (R.Br.Opp. 24). But respondents now maintain that the assertedly uniformly accepted legal standard is neither the strict rule of the Second, Fourth and Sixth Circuits, nor the

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[5]Brief for Plaintiff-Appellant Paul Wimmer, No. 97-7321 (2d Cir.), p. 24 n. 5.

"mistake of law" rule in the Ninth and District of Columbia Circuits. Rather, respondents in this Court assert that the correct and generally accepted rule is that the reasonableness of a complaint should be determined in light of "the state of the law at the time the employees engaged in the alleged protected activities." (R.Br.Opp. 24). That is indeed the very standard utilized by the Third, Seventh, Eighth and Eleventh Circuits, see Petition pp. 12-14, but it assuredly is not the standard which respondents advanced in the courts below or which the Second Circuit adopted.

The distinction between the holding of the Second Circuit below and the rule of law which respondents now label the uniform national standard is illustrated by the differences between passages in the Brief in Opposition and in respondents' earlier brief in the Second Circuit. In this Court, respondents insist

> an employee need not establish that the conduct he opposed was in fact a violation of Title VII.

(R.Br.Opp.18). But in the court of appeals, respondents objected to this very principle:

> Wimmer contends in his brief at p. 21 that the district court erred in dismissing his Title VII claim because, "[i]t is a well established principle that in a retaliation case an employee need not prove that the conduct opposed was in fact a violation of Title VII." *This contention is only half correct.*[6]

Respondents advised the Second Circuit that the doctrine invoked by petitioner was "half" incorrect because on respondents' view a complaint was not protected if the complainant had erred in thinking that Title VII prohibited the actions complained of. (See infra, text at n. 3). That

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[6]Brief for Defendants-Appellees, No. 97-7321 (2d Cir.), pp. 26-27 (emphasis added).

distinction, of course, is precisely the question at issue in this case.

(2) Respondents contend that petitioner is precluded from asking this Court to overturn *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), because we did not urge the Second Circuit to do so. In the lower courts, however, litigants are constrained to limit their arguments to interpreting existing Supreme Court precedent, since the courts of appeals have no authority to overturn or disregard decisions of this Court.

(3) Respondents' forcefully written statement of the case illustrates dramatically the numerous disputes of fact that exist in this litigation. Those disputes were never resolved by the jury empaneled to hear this case, because respondents argued and the lower courts held as a matter of law that even on petitioner's version of the facts respondents were entitled to prevail. A decision by this Court sustaining the legal sufficiency of petitioner's contentions would leave respondents free on remand to continue to defend this case on factual grounds.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

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